

**BEFORE THE  
MINNESOTA PUBLIC UTILITIES COMMISSION**

**Katie Sieben  
Valerie Means  
Matt Schuerger  
Joseph Sullivan  
John A. Tuma**

**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 for the 84  
MW Freeborn Wind Farm in Freeborn County

**PUC Docket No. IP6946/WS-17-410**

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**ASSOCIATION OF FREEBORN COUNTY LANDOWNERS  
PETITION FOR RECONSIDERATION**

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Association of Freeborn County Landowners (hereinafter “AFCL”), intervenor in the above-captioned docket, bring this Motion for Reconsideration of the Public Utilities Commission’s Amendment of the Site Permit decision of December 19, 2019, and the Commission’s written Order filed on March 31, 2020. A Petition for Reconsideration must be brought within 20 days of the filing of the Final Order. Minn. Stat. §216B.27; Minn. R. 7829.3000. This Petition for Reconsideration is a timely petition under the Commission’s rules.

The procedural posture of this permit docket includes an appeal of the Commission’s May 10, 2019 Order, now stayed pending this March 31, 2020 Order, and the Appellate Court has ordered that Association of Freeborn County Landowners exhaust this administrative process

before appealing the Commission's decision regarding AFCL's Petition for Environmental Assessment Worksheet. AFCL is now taking steps toward exhausting administrative options and perfecting the appeal by requesting Reconsideration of the March 31, 2020 Order. The issues raised are not new, and have been raised repeatedly over the last two years. Xcel Energy filed much NEW information revealing substantial impacts, modeling which showed improper inputs and concerning results including potential and likely certainty of substantial impacts, none of which was given serious consideration, there was little or no opportunity for public comment., and no contested case or public hearing was held.

### **BACKGROUND**

In its March 31, 2020 Order, the Commission denied AFCL's Petition for an Environmental Assessment Worksheet (EAW), its request for an Environmental Impact Statement, and its Motion for referral to the Office of Administrative Hearings for a contested case proceeding. In the same Order, the Commission granted Xcel Energy's Application and request for amendment of the Freeborn Wind site permit.

AFCL had filed multiple requests with the Commission, including a Motion for a Contested Case and for Environmental Review, and on January 1, 2020, filed with the EQB a Petition for Environmental Assessment Worksheet. The Environmental Quality Board forwarded the AFCL Petition to the Public Utilities Commission on January 3, 2020, with specific instructions regarding handling of the Petition. The Commission acted, filed notice of its decision on the EAW Petition, but did not include a Record of Decision with that notice. The Commission did formally deny the AFCL Petition for EAW in its March 31, 2020 decision, but did not address the specific considerations required by the Environmental Quality Board.

The Commission also made its decisions regarding Environmental Review and the

Amended Permit without a hearing before an Administrative Law Judge and there was no summary report – in addition, the information at issue was provided by the applicant as compliance filings with no opportunity for review and comment. Permitting was taken from public view and handled behind closed doors of the Dept. of Commerce-EERA and the Commission. This is contrary to the very Findings of the Commission in issuing the initial permit Order of December 19, 2018:

**Finding 243**

Should the Commission choose to do so, it could provide Freeborn Wind with an opportunity to submit a plan demonstrating how it will comply with Minnesota’s noise standards at all times throughout the footprint of the Freeborn Wind Project. ~~The plan should include low frequency noise measurements for evaluation in consultation with MDH.~~

**Finding 244**

The Administrative Law Judge further recommends that the plan be made available for public and agency comment and a hearing held with a summary report. The Commission should then review and approve a pre-construction noise mitigation plan that best assures that turbine noise will not cause noise levels that exceed Minnesota’s noise standards.

The Commission has not adhered to the Findings that it adopted after the initial contested case, in which it expressly acknowledged the need for public process and expanded that public process to include a hearing. See Minn. Stat. §216E.08. Many extensive Compliance Filings were made by the applicant, well over 1,000 pages, but these material documents were simply filed and accepted by Commerce-EERA. These filings included the new site plan, shadow flicker studies with extensive reports, and the updated noise study, and there was no valid or meaningful public process. There was no new plan made available for public comment, nor was there a hearing held with a summary report, prior to granting of the permit. Freeborn Wind has not been required to demonstrate how it will comply with the noise standards based on its updated noise modeling, there is no explanation for or basis for the setbacks used, and there is demonstration of

material impact sufficient to require mitigation, yet no environmental review. Instead, the Commission arbitrarily granted a permit, and moved the balance of the permitting process to a post permit filings and private pre-construction meetings. This improper result of shifting input of information needed in the application for review to a post-permit process of receiving necessary information in compliance filings, out of the public eye, was specifically addressed by AFCL in previous Commission meetings regarding this permit, and those concerns were disregarded.

Reconsideration is appropriate where there are new issues, new and relevant evidence, errors or ambiguities in the prior order, or when the Commission is otherwise persuaded that it should rethink the decisions set forth in its order, which the Commission may take up on its own, or upon a petition setting out specific grounds or errors. Minn. Stat. §216B.27, Subd. 2; Minn. R. 7829.300, Subp. 2. The Commission should also be mindful of the standard of review for its decisions. The appellate court may reverse or remand an agency decision if it is a) in violation of constitutional provisions; b) in excess of the statutory authority or jurisdiction of the agency; c) made upon unlawful procedure; d) affected by other error of law; e) unsupported by substantial evidence in view of the entire record as submitted; or f) arbitrary and capricious. Minn. Stat. §14.69.

In this case, the Commission could instigate environmental review on its own, and it was required to address environmental review upon AFCL's petition. The Commission had specific directions and rules from the EQB, setting forth considerations in its determination of whether to require environmental review. Minn. R. 4410.1700, Subp. 7. The March 31, 2020 Order gives lip service to the EQB criteria to be used when determining the necessity of environmental review, but there is little that could be called "analysis" or "consideration" in the Commission's

deliberations or this March 31, 2020 Order. “Consideration” requires more than a cut and paste of the language in the EQB’s rule and a few gratuitous words. See Minn. R. 4410.1700, Subp 7 and Order, fn. 21, 22, 23, 24 and linked language, p. 12-13. The Order claims that “[t]he only matter that remains before the Commission is action on Xcel’s petition to amend the site permit to authorize installation of a different turbine model and updating the project layout.” Order, p. 10. The Order attempts to explain why environmental review is not needed, and relies on the rulemaking SONAR statement that “environmental and human consequences of wind turbines are relatively minor and can be minimized by appropriate permit conditions...” Order, p. 10. This statement does not take into account the issues arising in wind turbine siting dockets or the Commission’s actual and well documented record and experience with these issues.

An agency’s decision will be deemed arbitrary or capricious if “its determination represents its will and not its judgment.” *Markwardt v. State Water Resources Board*, 254 N.W. 2d, 371, 374 (Minn. 1977). It will also be deemed arbitrary and capricious if the agency relied on factors which the legislature had not intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Trout Unlimited, Inc. v. Minn. Dep’t of Agric.*, 528 N.W.2d 903, 907 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

The Commission seemed intent on granting Freeborn Wind a site permit, contrary to the Recommendation of the Administrative Law Judge, and despite the ALJ’s finding that the Applicant had not demonstrated it would comply with noise standards, and then granted a permit without any demonstration that the applicant could indeed comply with state noise standards despite months to produce such demonstration. Further, the Commission, for a second time in

this docket, with this amended Order, granted a permit and with a provision for modeling to be provided after the permit was issued, prior to a pre-construction meeting, with no opportunity for public review, comment, or cross-examination. This decision is counter to the evidence, counter to procedures adopted by the Commission, counter to state statutes and standards, and beyond the authority of the Commission. The Order is in excess of the Commission's statutory authority; it is made upon unlawful procedure and legal errors; is unsupported by substantial evidence; and is arbitrary and capricious.

Association of Freeborn County Landowners again asks for Reconsideration of the Commission's Order in this matter of first impression of environmental review for a wind site permit, whether through a Petition for EAW or a party request for an EIS. and for modification of the Order in several specific ways to result in an Order supported by the law and facts of this case.

**I. COMMISSION'S DENIAL OF AFCL'S MULTIPLE REQUESTS FOR ENVIRONMENTAL REVIEW AND PETITION FOR ENVIRONMENTAL ASSESSMENT WORKSHET IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND AN ERROR OF LAW.**

The Commission's handling of the AFCL's multiple requests for environmental review and AFCL's Petition for Environmental Assessment Worksheet was contrary to the rules of the Environmental Quality Board that govern decisions regarding environmental review and EAW Petitions, and was insufficient because the Commission did not consider the criteria for an EAW Petition decision and no Record of Decision with Findings of Fact was produced at that time or on providing notice of decision to the EQB. What has been provided in the Order is insufficient. See *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 577 (Minn. 2000)(insufficient findings for review sufficient basis for remand). The Order's sentences that

use language of the EQB’s criteria for deciding potential for significant environmental effects, and several footnotes covering the criteria, is not indicative of adequate consideration of the factors. Minn. R. 4410.1700, Subp. 7. The Commission’s Order does not take into account “a combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings.” *In re Claim for Benefits by Meuleners*, 725 N.W. 2d 121, 125 (Minn. Ct. App. 2006). The many danger signals were not discussed, were not considered, in the Order, and the “Findings” are little more than a restatement of the EQB criteria for a decision. The Order is also not compliant with the Minnesota Environmental Policy Act, which requires that “[w]here there is potential for significant environmental effects resulting from any major governmental action, the action must be preceded by a detailed environmental impact statement prepared by the responsible governmental unit.” Minn. Stat. §116D.04, Subd. 2a. “[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W. 2d 264, 278 (Minn. 2001). Conversely, [i]n applying the substantial-evidence test, a reviewing court must “determine whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.” *In the matter of the reissuance of an NPDES/SDS Permit to United States Steel Corporation 5(U.S. Steel) for its Minntac facility*, p.26, December 9, 2019<sup>1</sup>, quoting *In re Application of Minn. Power*, 838 N.W. 2d 747, 757 (Minn. 2013). As that decision notes, “... deference is warranted only where the agency has engaged in reasoned decision-making.” *Id.*, 29. Reasoned decision-making has not

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<sup>1</sup> <http://mncourts.gov/mncourtsgov/media/Appellate/Court%20of%20Appeals/Standard%20opinions/OPa182094-120919.pdf>

occurred with this Order.

This is a situation where no deference is due. Few Petitions for Environmental Review are filed with the Environmental Quality Board directed at the Public Utilities Commission, perhaps only one other such petition has been filed in recent history. See *In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package*, Nos. A19-0688, A19-0704, 2019 WL 7042812 (Minn. Ct. App. Dec. 23, 2019)(remanding to Public Utilities Commission for environmental review).

The Commission has no expertise in this area of petitions to the Environmental Quality Board for environmental review, evidenced by the claim in the Briefing Papers<sup>2</sup> prior to the February 6, 2020 meeting that there were not sufficient signatures for the Petition and that the Commission had jurisdiction to deny the Petition as invalid on the basis of that false statement that there were insufficient signatures on the Petition<sup>3</sup>; with Commission failure to issue a Record of Decision with its notice of decision and its failure to file on EQB Monitor website<sup>4</sup>; and apparent lack of knowledge of process. The Commission's decision regarding AFCL's Petition for EAW should not receive great deference.

On January 1, 2020, AFCL filed a Petition for Environmental Assessment Worksheet with the Environmental Quality Board, which on January 3, 2020 was forwarded to the Public Utilities Commissions as the Responsible Governmental Unit. The EQB's transmittal letter was very specific about how, procedurally, the Commission was to deal with this Petition. The instructions stated:

When considering the evidence provided by the petitioners, proposers, or other persons, the Minnesota Public Utilities Commission must take into account the factors listed in

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<sup>2</sup> Staff Briefing Papers filed 1/27/2020 ([20201-159669-01](#)).

<sup>3</sup> See AFCL LETTER--CORRESPONDENCE AND ATTACHMENTS RE FALSE AND MISLEADING STATEMENTS IN BRIEFING PAPERS, 1/28/2020 ([20201-159724-01](#)).

<sup>4</sup> AFCL Reconsideration Exhibit B, filed 2/13/2020 ([20202-160414-01](#)).

part 4410.1700, subpart 7. Note that this requires that a record of decision, including specific findings of fact, be maintained.

Exhibit A, EQB Letter of Transmittal, January 3, 2020, p. 2.

The EQB transmittal letter goes on to state:

You must provide written notification of your decision to the proposer, the petitioners' representative, and the EQB, within 5 working days as described in part 4410.1100, subpart 8. Please provide written notification to these parties even in cases where an EAW or EIS will be prepared according to part 4410.1000, subparts 2 or 3, or the project is found to be exempt from environmental review.

- a. To notify the EQB of your decision on the need for an EAW, complete the [EQB Monitor submission form](#) found on the EQB website. The EQB requests that you **upload a copy of your record of decision** using the same electronic submission form, including instances where environmental review is mandatory, voluntary, or exempt.

Exhibit A, EQB Letter of Transmittal, January 3, 2020 (emphasis added).

#### **A. The Commission Failed to File a Record of Decision with Notice of Decision**

On February 13, 2020, the PUC gave notice via email that the Commission had denied

AFCL's Petition for EAW. The email stated:

*As we discussed, I am unable to submit the letter via the EQB's Monitor webpage and will work with your colleague tomorrow to have up submitted as soon as possible.*

Exhibit B, PUC Notice to EQB, February 13, 2020. The attached letter said simply:

Enclosed is the Public Utilities Commission's response to the January 3, 2020 petition requesting preparation of an Environmental Assessment Worksheet (EAW) for the Freeborn Wind Project.

At its February 6, 2020 Agenda Meeting, the Commission made the following decision:

Deny the petition on the merits pursuant to Minn. R. 4410.1100, subp. 6, and 4410.1700, subp. 7.

Deny the petition pursuant to Minn. R. 4410.4300, subp. 3(D), and 7854.0500, subp. 7.

Authorize the Executive Secretary to issue a Record of Decision on the matter based on the enclosed draft version, incorporating any Commission modifications or technical corrections by staff.

Pursuant to Minn. R. 4410.1100, subp. 8, this letter serves as notice that the Commission has declined the request to prepare an EAW. The Commission will memorialize its decision and set forth its rationale by written order, and maintain a record of its decision on the need for an EAW.

Id., p. 2. As noted on the email, this was filed in the Commission's eDocket system, just this letter, no more. No Record of Decision was filed with the EQB or on the Public Utilities Commission's eDocket filing system. Notice of the Commission's decision was published in the EQB Monitor on February 18, 2020, triggering the EQB's statutory 30-day window for appeal. See Minn. Stat. §116D.04, Subd. 10. AFCL did file a timely appeal, and on April 2, 2020, the court ordered that the AFCL appeal be dismissed as premature, and that AFCL may refile for review after a petition for rehearing of the Commission's March 31, 2020 Order. Exhibit C, Appellate Order April 2, 2020. The Commission's failure to file a Record of Decision as required by EQB rule meant that AFCL had to file its appeal prior to any written Commission Order, a waste of resources for a community grassroots organization.

**B. The Commission's Order of March 31, 2020 Does Not Comply with EQB Rules and Findings are Insufficient to Support Denial of Petition.**

The Commission's Order of March 31, 2020, denying the AFCL Petition for an Environmental Assessment Worksheet does not meet the requirements for a decision regarding such a Petition. The Order contains minimalistic parroting of the EQB criteria, including the declaration that "[t]his order and its supporting materials comprise the record of decision under Minn. R. 4410.1100, subp. 6," and other statements made without support. See Order, fn. 21-25, and statements on p. 12-13. There was no consideration of substantive relevant information in the record and presented by AFCL. There is no project specific analysis or Findings of Fact regarding environmental impacts, information contained in the record and of which the Commission is aware. The Commission does list a summary of the Xcel Application, but this is not analysis. Order, p. 4-6. The "findings" in the Order and declaration that the Order constitutes the Commission's Record of Decision is insufficient to support the Commission's denial of AFCL's Petition for EAW. Order, p. 12-13. This failure to consider substantive material

information is indication of an arbitrary and capricious decision. *White v. Minn. Dep't of Nat. Res.*, 567 N.W. 2d 724, 735 (Minn. Ct. App. 1997); *Citizens Advocating Responsible Dev. V. Kandiyohi Cty. Bd. Of Comm'rs*, 713 N.W. 2d 817, 832, 835 (Minn. 2006).

Environmental impacts that should be addressed are extensive, particularly found in the Xcel filings for the Permit Amendment and subsequent thousand or more pages of Compliance filings, including a new noise study with modeling using the improper 0.5 ground factor, hundreds of pages of shadow flicker information with presumed impacts – none of these Xcel filings have been the subject of a contested case or public hearing, and most of which have not been subject even to public comment. There are multiple material issues that are unexamined and which, once a project is built, offer few possibilities for mitigation. The Commission has actual and constructive notice of these significant impacts, and has direct knowledge of the Bent Tree landowners buyouts following Commerce-EERA demonstrated noise exceedences, and the Big Blue project noise issues, together with shadow flicker complaints and mitigation, as well as issues with the complaint process and decommissioning plan.

For its Site Permit Amendment request, Xcel filed new information regarding these and other issues, and there has been no environmental review or analysis and very limited public comment or input opportunities. This is not consistent with the Minnesota Environmental Policy Act or the Commission's mandate of a broad spectrum of citizen participation as its principle of operation. Minn. Stat. 216E.08 (edited, the statute reads "principal" of operation).

The EQB's transmittal letter to the Commission contained specific direction as to how the Commission should handle the AFCL Petition, standard transmittal letter language based on Environmental Quality Board Rules. See Minn. R. 4410.1000-1700. The transmittal letter sets out how the decision must be made and what is to be considered:

The standard for making the decision on the need for an EAW is provided in part 4410.1100, subpart 6. When considering the evidence provided by the petitioners, proposers, or other persons, the Minnesota Public Utilities Commission must take into account the factors listed in part 4410.1700, subpart 7. Exhibit A, EQB Letter of Transmittal, January 3, 2020 (emphasis added).

**Standard.**

In deciding whether a project has the potential for significant environmental effects the RGU shall compare the impacts that may be reasonably expected to occur from the project with the criteria in this part.

Minn. R. 4410.170, Subp. 6

**Criteria.**

In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;
- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700, Subp. 7; see Order, fn. 21-25, p. 12-13.

The Commission did not address the criteria in its March 31, 2020 written Order in other than cursory and conclusory statements, without related specific Findings, nor was this criteria addressed at the Agenda meeting of February 6, 2020.

The Commission’s March 31, 2020 Order includes a section entitled “Environmental Impact Analysis,” a 2 ¾ page listing of Xcel’s reporting of environmental information required in a permit application. Minn. R. 7854.0500, Subp. 7. This section opens with the telling paragraph:

In support of its petition, Xcel reported on how its analysis of the project’s environmental consequences has changed over time—partially due to Xcel’s proposed changes, but mostly due to changes arising from other sources. Xcel’s discussion is summarized below...

Order, p. 4. The “Environmental Impact Analysis” contains the word “Xcel” 44 times, as this section restates the points raised by Xcel in its Application, i.e., “Xcel stated” nine times; “Xcel reported” eleven times. *Id.*, p. 4-6. This is Xcel’s position, and there is no comparison of “the impacts that may be reasonably expected to occur from the project with the criteria in this part.” Minn. R. 4410.1700, Subp. 6.

The overview of Xcel’s take on its project from its project application is summarized as follows:

In sum, Xcel generally argued that the description of resources, impacts, and mitigating measures described as part of its proposed amendment to the site permit and project layout are consistent with the existing record supporting the existing permit and layout.

Order, p. 6.

In addressing AFCL’s Petition for Environmental Review, the Order states:

“The Commission concurs with the Department, Fresh Energy, and the MCEA<sup>5</sup> that no additional environmental review is required for the Freeborn Wind Project as a matter of law.”

Order, p. 10. This statement relies on the belief that the application content provision of information is “environmental review” and that, as the application content rule states, that “[n]o environmental assessment worksheet or environmental impact statement shall be required on a

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<sup>5</sup> Fresh Energy and MCEA are not parties in this docket, and there was no public comment period. The Commission ignored AFCL’s request to strike this comment from the record, noting that:

First, there is no open comment period at this time, and AFCL requests that the letter be stricken from the record.

Second, and more importantly, MCEA contends that the requirements of Minn. R. 7850.0500, Subp. 7 constitutes “compliance with duly adopted alternate environmental review process satisfies the Commission’s environmental review responsibilities under MEPA.” Letter, p. 1 (quoting final paragraph of that subpart). However, saying it is so does not make it so. The rule cited, Minn. R. 7850.0500, Subp. 7, is not a “duly adopted alternate environmental review process.” It is a rule governing application content.

AFCL Letter, 2/3/2020 ([20202-160058-01](#))

proposed LWECS project.” Minn. R 7854.0500. These rules, Chapter 7854, were promulgated in response to a legislative mandate to develop rules, including, specifically:

- (1) criteria that the commission shall use to designate LWECS sites, which must include the impact of LWECS on humans and the environment; ...
- (4) requirements for environmental review of the LWECS;

Minn. Stat. §216F.05, Subd. 1, 4.

Instead of developing criteria and requirements per the legislative mandate, wind projects were categorically exempted from environmental review, and the Commission quotes the unfounded SONAR statement that:

**Because the environmental and human consequences of wind turbines are relatively minor and can be minimized by appropriate permit conditions, the EQB is not requiring in these rules that an Environmental Assessment Worksheet or an Environmental Impact Statement be prepared on a proposed LWECS. It is sufficient that the environmental impacts and mitigative measures be discussed in the application itself. If an issue of concern were to be raised specific to a particular wind project, the EQB could ask for additional examination of those impacts and could address the concern through permit conditions or by moving some of the turbines.**

EQB’s Statement of Need and Reasonableness, at 20 (included in AFCL’s EAW Petition, Exhibit V (emphasis added)<sup>6</sup>. The Commission further states that:

Xcel provided the listed information when it petitioned for amending the project’s site permit, and all parties have had the opportunity to analyze it. This information identifies the type, extent, and reversibility of environmental effects.

Order, p. 12. The information does provide some information as to the types of impacts, but there is only minimization of the extent of the impacts, and no information regarding reversibility of environmental effects – the information provided by Xcel does not identify “the type, extent, and reversibility of environmental effects.” As for reversibility of environmental

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<sup>6</sup> Exhibit V of Petition, “Other-Exhibit I-W\_Part 2,” filed in the Commission’s docketing system on January 15, 2020 ([20201-159161-07](#)).

effects, once a wind project is built, there are not many options for mitigation, other than landowner buyouts as occurred in Bent Tree, because project owner/operators and the Commission aren't willing to shut off the turbines or pull them up out of the ground. Further, any prospect of reversing impacts, as planned by the Commission and Xcel, is dependent on the dysfunctional, lengthy, and laborious complaint process, and which requires affirmative complaints rather than precautionary permitting when dealing with known and anticipated issues. See PUC Bent Tree Site Permit Docket WS-08-573.

The environmental information presented in the applications is no substitute for environmental review. The legislature mandated development of wind siting rules, and rules were promulgated, to address some factors enumerated by the legislature, but only some of the factors. There are no wind specific siting requirements and standards, such as setbacks for various purposes including wind access, noise and shadow flicker prevention, and human and wildlife protections. Minn. R. ch. 7854. There is no support in the SONAR cited by the Commission in its Order for the presumption that the environmental and human consequences of wind turbines are relatively minor and can be minimized by appropriate permit conditions, and there is no support for the Commission's statement that the application content provided by Xcel is a substitute for the Commission's missing analysis of the type, extent, and reversibility of environmental effects necessary when making a decision regarding an EAW Petition. The Commission claims that "potential effects of Xcel's proposed permit amendments and turbine layout revisions (including cumulative potential effects) are not significant," and that "Xcel has demonstrated a concerted effort to minimize the project's environmental effects, that Xcel has developed models in order to anticipate the project's environmental effects such as noise and shadow flicker, and has modified its plans to moderate these effects." Order, p. 12.

The Commission's denial does not make it so. This simple claim does not reflect consideration of the potential effects, and instead, this is an admission of material effects that will require planned for mitigation. Secondly, the noise and shadow flicker modeling was provided as "Compliance Filings," and there has been no opportunity for public comment, much less a hearing, on these filings, and no opportunity for AFCL to address the significant intentional use of "garbage in/garbage out" modeling, particularly for noise, with use of a 0.5 ground factor not appropriate for an elevated source, and also for the shadow flicker modeling, which shows very high expected hours of impact, among other issues. By producing these as "compliance filings," there has been no public forum to address these hundreds of pages of filings.

The Commission also relies on the permit and necessary compliance, as demonstration that the Commission will exercise control. The Commission's complaint process has been at issue for over a decade, and was specifically raised in this Freeborn Wind docket. A look at the Bent Tree docket is a demonstration of the extreme dysfunctionality of the Complaint process, so worthless and unworkable that it was raised as an issue in the original contested case, and in filings since. Xcel dropped its "complaint process" in a Compliance Filing, and despite AFCL's request to initiate a review and improvement of this process, AFCL and the public have had no opportunity to comment on or improve the Complaint process. It remains an issue, as of last week, with AFCL filing this procedural complaint in a "Substantial Complaint" filed last week, specifically regarding the complaint process:

The Complaint Process to be used regarding the Freeborn Wind site and transmission permits was produced by Xcel Energy on December 6, 2019, 13 days prior to the Commission meeting of December 19, 2019, and relies on complaints, which is particularly problematic when affected people must file formal complaints about issues known to be problematic at the time of permitting, particularly issues regarding noise and shadow flicker. The project will continue to operate, inflicting impacts on residents as

the complaint moves through Xcel, for “resolution,” and to be reported in a monthly report to the Commission. Then “Commission staff shall perform an initial evaluation of unresolved complaints, unresolved according to the report, with “substantial complaints to be resolved by the Commission.” “[e]ach party shall submit a written summary of its position to the Commission no later than ten days after receipt of the staff notification. The complaint will be presented to the Commission for a decision as soon as practicable.”

Rich Davis, Commerce-EERA, seems to believe the Complaint Process is adequate. AFCL vehemently disagrees.

The complaint process provided unilaterally by Xcel Energy on December 6, 2019 is nothing more than a cut and paste of the inadequate complaint procedure that was a subject of the Contested Case proceeding, with the change of contacts from Invenergy’s Dan Litchfield to you, for Xcel Energy. where Association of Freeborn County Landowners raised the issue of the unworkable nature and inadequacy of the complaint process, with this testimony from Rich Davis, EERA:

Q: Over the years since wind projects have been permitted, has there been – has there been any revision of this complaint process?

A: In my four-and-a-half years that I’ve been with Commerce, it’s – there’s been some minor tweaks here and there, but nothing full scale or anything along those lines.

Q: What would it take to initiate a review of the complaint process?

A: This is when you would provide comments on it. It’s part of the draft site permit, so –

Q: So right now?

A: So this is when comments should be submitted, yeah.

Freeborn Wind, Tr. p. 180.

Comments regarding the complaint process were repeatedly submitted and also argued in briefing:

**The Public Utilities Commission is on notice that noise has been a problem for residents living within wind projects, that complaints have been made, that the complaint process is broken, and that noise violations have been documented. AFCL-11, Bent Tree Noise Monitoring and Noise Study, Phase I; see also Bent Tree Noise Report, Phase II, p. 10 of Comment of Stephanie Richter, 3/15/2019 (20183-141042-01); AFCL 15, Hansen Rebuttal, Schedule F, Big Blue –PUC**

**Letter -Request for Response to Alleged Site Permit Violations and to Show Cause.** Not only is noise specifically regulated by MPCA rule, but it is a factor within the PPSA criteria, particularly where the criteria seeks to minimize environmental impacts, minimize human settlement and other land use conflicts, public health and welfare, adverse direct and indirect environmental effects, irreversible and irretrievable commitments, consideration of problems raised by agencies, and state agency rules. See Minn. Stat. §216E.03, Subd. 7 (a), (b) (1), (2), (3), (5), (6), (11), (12), (d). Wind projects have not performed adequate modeling prior to construction, and post-construction noise modeling has shown that at least two projects thus far are not compliant with noise rules and permit conditions.

AFCL Initial Brief, p. 32 (emphasis added); see also p. 17. (quoting Davis, Tr. Vol 2, p. 176-180).

Freeborn is at the same time specifically asking for the Commission to pre-empt the local ordinance, claiming “good cause” so that it need not comply with Freeborn’s wetland ordinance, and states **that compliance with the shadow flicker ordinances will rely on resident complaints and turning off turbines at times shadow flicker is anticipated. FR-11, Litchfield Rebuttal, Schedule 1, Response to AFCL IR 17.** A review of the shadow flicker charts shows far greater than 30 hours annually of shadow flicker is projected. Freeborn’s plan that relies on complaints made by residents, reacting to issues only after receiving complaints and investigating, as if residents will mark shadow flicker on their calendar with stopwatches at the ready, is inadequate, and that does not provide a basis for “good cause” not to comply with the Freeborn County Ordinance. Litchfield, Tr. Vol. 1A, p. 33, l. 12-15; AFCL-19 & FR-11, Litchfield Rebuttal Schedule 1, Response to AFCL IR 17. Freeborn Wind claims that the initial shadow flicker assessment “confirms that Freeborn Wind has considered shadow flicker when siting wind turbines to minimize impacts to all area residents.” Freeborn Initial Brief, p. 26, but c.f. Public Comment, Kathy Nelson, 7/3/2017 ([20177-133467-02](#))(Freeborn’s Litchfield’s advice to take trip to Florida to avoid shadow flicker).

The PPSA siting criteria demands more than confirmation of consideration,” and requires more than permitting a non-compliant project and moving on to “mitigation” in the form of blinds, turning off turbines after complaints to comply, or winter trips to Florida – this would presume siting with known non-compliance!

AFCL Reply Brief, p. 14-15 (emphasis added); see also p.20-21 (including recommendation that that “[a]ny noise criteria beyond current state standards used for placement of wind turbines should reflect priorities and attitudes of the community. FR-6, Roberts Direct, Schedule. 7, MDH Report, p. 28-29 of 32.)

...

As above, the matter of the dysfunctional complaint process was brought up repeatedly in the original Commission proceeding, in many different ways. The complaint process needs to be revised. There was no opportunity for Comment on this unilaterally designated complaint process, there were no substantive changes, and it still improperly relies on affirmative complaints by impacted residents to raise issues that are obvious and predictable.

AFCL Letter-Complaint Prohibited Construction (selected), April 9, 2020 ([20204-161959-01](#)).

No substantive changes have been made to the complaint process, and the issues raised have not been resolved. A formal complaint using the Xcel complaint process has been filed by AFCL.

There is much evidence in the Freeborn Wind record demonstrating that there is potential for environmental impact, and there is much evidence in the Commission's dockets that mitigation and permit conditions have been inadequate, particularly regarding noise and shadow flicker. The Commission claims that application content requirement equate to environmental review, yet the Commission, Fresh Energy, and MCEA can produce no law on point. There is no support for the notion that Minn. R. 7854.0500, Subp. 7's application content requirements constitute environmental review and is in compliance with the Minnesota Environmental Policy Act. This would be an issue of first impression before the Appellate Court.

The Freeborn Wind project has a 26,273 acre footprint. Xcel Application, p. 2, and Attachment A. There is no indication in the SONAR that a project of this 26,000 acre magnitude was anticipated. The project is moving into an existing farming and residential community, and the Commission's adoption of the presumption of minor impacts and minimization by appropriate permit conditions contained in the nearly 20 year old SONAR is bizarre given the history of the Freeborn Wind docket, the Bent Tree noise landowner buyouts, and other material issues raised. The AFCL petition, forwarded to the Commission, was a request for additional examination of those impacts, the ones laid out in Xcel's multiple filings.

The EQB's factors to be considered in determining whether to require environmental review includes the extent to which environmental effects can be anticipated and controlled through use of studies. Despite the notice of potential significant impacts, despite significant impacts with other projects, despite material issues with studies provided by the Applicant, and despite the lack of an Environmental Assessment Worksheet or Environmental Impact Statement on any wind project thus far, the Commission relies on a dysfunctional complaint process and blanketly denies potential for significant environmental impact:

This ability to remedy actual problems as they arise, rather than to seek to anticipate and guard against every possible problem that might arise, provides a reasonable and lawful safeguard for the public interest.

In short, the Commission finds that the environmental effects arising from Xcel's proposed changes are subject to monitoring by public regulatory authorities, and subject to specific remedial measures that can be reasonably expected to effectively mitigate the identified environmental impacts.

Order, p. 13. The people who have direct experience with the complaint process regarding environmental effects have testified in this Freeborn Wind docket that any expectation that impacts can be expected to effectively mitigate the identified environmental impacts is unreasonable. The Commission's presumptions are not supported by the record.

The Commission's handling of the AFCL's multiple requests for environmental review and AFCL's Petition for Environmental Assessment Worksheet was contrary to the rules of the Environmental Quality Board that govern decisions regarding environmental review and EAW Petitions, and was insufficient because the Commission did not consider the criteria for an EAW Petition decision and no Record of Decision with Findings of Fact was produced at that time or on providing notice of decision to the EQB. What has been provided in the Order is insufficient. The order shows that the Commission did not address the material issues raised by AFCL and others, that the Commission did not consider, and gave only lip service to the factors required by

the Environmental Quality Board in making a decision regarding a Petition for EAW, that the Commission's is contrary to both the mandates of the Minnesota Environmental Policy Act and the Commission's mandate for public participation.

**II. THE COMMISSION'S DENIAL OF REFERRAL TO OFFICE OF ADMINISTRATIVE HEARINGS FOR A CONTESTED CASE PROCEEDING IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND AN ERROR OF LAW.**

The Public Utilities Commission regulates utilities and project site permits, and in this case, the Commission is the state entity that issues site permits for Large Wind Energy Conversion Systems (LWECS). See Minn. Stat. Ch. 216F. Again, "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W. 2d 264, 278 (Minn. 2001).

There is no right to a contested case proceeding. Referral for a contested-case proceeding is primarily a matter for the Commission:

**7829.1000 REFERRAL FOR CONTESTED CASE PROCEEDING.**

If a proceeding involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction, the commission shall refer the matter to the Office of Administrative Hearings for contested case proceedings, unless:

- A. all parties waive their rights to contested case proceedings and instead request informal or expedited proceedings, and the commission finds that informal or expedited proceedings would be in the public interest; or
- B. a different procedural treatment is required by statute.

On what basis is a finding reasonable that declares "that all significant issues have" or have not "been resolved to its satisfaction{?]" Support of this declaration is necessary.

On December 12, 2019, AFCL filed another Motion for a contested case<sup>7</sup>. The Commission accurately states that “the Commission already referred this docket to the Office of Administrative Hearings for a contested case proceeding.” Yes, the initial Freeborn Wind site permit application filed by Invenergy was the subject of the first contested case ever for a LWECs site permit in Minnesota, held in the winter of 2018, with the Order and permit issued December 19, 2018. Since that time, the project has substantially changed. Freeborn Wind was sold to Xcel Energy, and in August 2019, Xcel Energy applied for a Site Permit Amendment and has made thousands of pages of compliance filings on November 8, 2019, December 6, 2019, February 10, 2020, February 24, 2020, March 11, 2020, and March 12, 2020. These filings include a hitherto unreleased “Decommissioning Plan,” Site Plans, hundreds of pages of the shadow flicker study, the Xcel “Complaint Process,” and the Noise Study update. The only public comment period during this time was noticed on October 23, 2019 and closed on November 12, 2019 for Initial Comments, and November 19, for Reply Comments.<sup>8</sup>

The Commission claimed only one issue remained unresolved after the initial contested case proceeding, and that it addressed “that concern” (noise) when it approved the initial site permit. Order, p. 9. That is a misleading statement, as no updated noise modeling was provided until March 13, 2020, **AFTER** the site permit amendment had been approved in deliberations at the February 6, 2020 Commission meeting! The Commission states that it “has solicited and received public comments on Xcel’s petition,” but as above, many, many significant filings were made after the one comment period closed<sup>9</sup>. The meeting of the Commission at which the site permit amendment was ostensibly made was on February 6, 2020, before many of these filings

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<sup>7</sup> AFCL Petition and Motion for a Contested Case, December 12, 2019 ([201912-158263-01](#)).

<sup>8</sup> See PUC Notice of Public Comment, October 23, 2019 ([201910-156851-01](#))

<sup>9</sup> See PUC eDocket Xcel Energy filings received after November 12, 2019.

were made, including the latest filing, the updated noise study. There have been thousands of pages of documents filed regarding environmental impacts which have had no public review or regulatory analysis. This is contrary to the letter and intent of the Minnesota Environmental Policy Act, the Minnesota Environmental Rights Act, and the Commission’s mandated “broad spectrum of public participation as a principle of operation.” Minn. Stat. ch. 116D; Minn. Stat. ch. 116B; Minn. Stat. §216E.08.

Late filed information, after the close of any comment period, with no opportunity for public review and comment, and failure to consider material available information was an issue in the remanded Polymet case. See *In the Matter of Issuance of Air Emissions Permit No. 13700345-01 for Polymet Mining, Inc.*, A19-0115, A19-0134, December 23, 2019 (Minn. Ct. App.)<sup>10</sup>. In this docket, the Comment period was opened and closed prior to the filing of many substantive Compliance Filings.

Many procedural matters in this docket have been repeatedly challenged by the Association of Freeborn County Landowners, and are now issues of first impression stayed at the Appellate Court. In this docket, for the first time, a contested case proceeding had been ordered for a wind project application, and the review was under the auspices of the Power Plant Siting Act, for the first time citing Minn. Stat. §216E.03, Subd. 7 (even the site permit does not list Minn. Stat. §216E.03, Subd. 7 in its statements regarding siting authority, only Minn. Stat. Ch. 216F and Minn. R. Ch. 7854). Not coincidentally, after a thorough review of the application and extensive record, far more extensive and thorough than in any other LWECs siting docket, for the first time an Administrative Law Judge had recommended that a LWECs siting permit be denied. The record evidence in that proceeding shows that the project did not demonstrate that it

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<sup>10</sup> Available online: <https://mn.gov/law-library-stat/archive/ctappub/2019/OPa190688-122319.pdf>

could and would comply with state noise regulation. However, the Commission instead granted that initial permit with a condition of “modeling and/or proposed mitigation” which does not require compliance and instead allows non-compliance with “mitigation.” To grant a permit in such a situation without that demonstration, and to push that demonstration to a future “pre-construction meeting” is legal error, a blatant violation of the Power Plant Siting Act and Minn. Stat. Ch. 216F.

### **III. XCEL ENERGY MUST COMPLY WITH STATE LAW AND RULES**

To the extent that the Commission relies on compliance with the site permit, the Commission is distracting from the requirement that the project be in compliance with state laws and rules. For example, there is no basis for a presumption that the Commission’s site permit application content is in compliance with the Minnesota Environmental Policy Act’s mandates for environmental review. Minn. Stat. ch. 116D. There is no basis for a presumption that compliance with the site permit’s Section 6.1 is in compliance with the MPCA’s noise standard. Minn. R. 7030.0400. These are material issues, ones that have not been addressed in a contested case focused on Xcel Energy’s amendment request and multitudinous filings, and ones where Xcel has not been required to demonstrate compliance with state laws and rules. A “special” permit condition such as Permit Condition 6 should not provide a means for circumvention of compliance.

### **IV. AFCL IS A PARTY AND HAS BEEN EXCLUDED FROM PRE-CONSTRUCTION MEETINGS**

AFCL has made many requests for notice of pre-construction meetings, and has yet to receive notice of any meeting. The November 25, 2019 pre-construction meeting began less than an hour after one of the several written requests filed by AFCL requesting notice! There was no

attempt to allow AFCL to join that meeting. The Commission makes much of the requirements of “Freeborn Wind to give various types of notice” in its Order, but AFCL is not among those entities named. Order, p. 13. AFCL is an intervenor with full party status, yet is left in the dark despite numerous requests for notice. This is contrary to the Commission’s public participation policy of operation. Minn. Stat. §216E.08. What is the point of party status and years of active and substantive participation?

V. **THE COMMISSION’S GRANT OF AN AMENDED SITE PERMIT DOES NOT MEET THE LEGAL STANDARD FOR WIND SITING PERMIT**

The Commission again makes an error of law in issuing the Amended Site Permit. In its Order, the changes proposed by Xcel are minimized, claiming changes to the turbine model and site plan, and changes to Site Permit Sections 2.0; 3.0; 3.1. The Commission does not acknowledge that more than one thousand pages of Application and “Compliance Filings” were filed by Xcel, including substantive changes from what was the subject of the contested case, particularly in the expected environmental impact categories of shadow flicker and noise, where new modeling results were filed. These filings have had no public review and no apparent regulatory review other than acceptance without critique. Other areas of particular interest to AFCL are the Xcel Energy Complaint Process and the Decommissioning Plan, neither of which were available in final form at the time of the Comment Period. Xcel’s Decommissioning Plan was essentially a cut and paste of the Decommissioning Plan revealed in this docket in the Draft Permit. Again, there have been no substantive changes to the plan, no substantive review or improvements, no incorporation of the Freeborn County decommissioning plan, financial assurance, and other requirements, and there has been no opportunity for review by the public. The Commission also did not address the faulty maps of the site plan, so poorly done that it is

impossible to tell the areas affected by the turbines, so poorly done that collector lines do not show on the map and may well be on land not under lease, so poorly done that Commerce-EERA had to ask for better maps in the November 25, 2019 pre-construction meeting (the meeting from which AFCL was excluded).<sup>11</sup>

The Commission's Order is arbitrary and capricious where the agency exercises its "will and not its judgment." *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). A permitting process must be more than a sham, and the regulators must take a hard look at the record and evidence. See *Citizens Advocating Responsible Dev. V. Kandiyohi Cty. Bd. Of Comm'rs*, 713 N.W. 2d 817, 832 (Minn. 2006).

There has been little apparent reasoned decision making in this permit amendment proceeding. The discussion at the Commission meeting was along the lines of questions of "applicant, does this work for you," rather than "what does this late filed noise modeling update mean," or "do these hundreds of pages of shadow flicker modeling results show more or less shadow flicker than before, and what is the impact on nearby residents" or "is the newly filed decommissioning plan reasonable" or "what is impact of larger turbines," or "how is this site plan different from previous site plans" There was no consideration of material issues in the "deliberation" and the Order is similarly without a "hard look." This proceeding is a sham proceeding as defined in Minnesota caselaw.

## **VI. A SPECIAL CONDITION HAS BEEN REQUESTED VIA XCEL'S COMPLAINT PROCESS FOR PROTECTION OF LOCAL DAY CARE**

Sue Madson, a local resident, landowner, and business operator, has made repeated requests for an analysis of the impact of the project on her day care, particularly impacts of noise

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<sup>11</sup> See Xcel Pre-Construction Meeting Summary, December 6, 2019 ([201912-158113-01](#)).

and shadow flicker, among other impacts. This day care is in very close proximity to turbines #20 and #21. See Comments of Sue Madson filed in eDockets, oral public comments, and public hearing testimony in record. Despite her frequent communications with Invenenergy and Xcel Energy personnel, and promises of an impact analysis, she has not received any review of the impacts. Ms. Madson's ongoing daycare was established long before the wind project was proposed, and the project, as proposed, encroaches on her use and enjoyment of her property. The applicants and the Commission have disregarded her legitimate concerns, concerns voiced over and over and over.

Pursuant to Minn. R. 7854.13, subp. 2., Ms. Madson requests that the PUC consider a special condition to the Permit, i.e., Section 13.0 Permit Amendment, that would remove turbines #20 and #21 to ensure that the proper conditions remain in place for the continued safe operation of her established Minnesota license daycare. This request has also been expressly made in a formal complaint to Xcel Energy.

**VII. ENVIRONMENTAL REVIEW IS NECESSARY FOR THIS AND EVERY LWECs PRIOR TO PERMITTING, AND PERMITTING REQUIRES MEANINGFUL REVIEW.**

Overall, AFCL's position is that the project should not go forward because the community does not consent to this project. For nearly twenty-five years, Large Wind Energy Conversion Systems (LWECs) have been sited across Minnesota without environmental review, without compliance to the most basic principles of the Minnesota Environmental Policy Act. The Commission has erred as a matter of law in its refusal to consider the environmental impacts of wind projects, the admittedly material impacts on the community in and near the project footprint, and has erred in failing to provide meaningful review to this project, instead greasing the skids with a sham permitting process to assure that this project goes forward. In its Orders, the Commission minimizes the material and substantial potential for environmental impacts,

impacts of which it has actual and constructive notice, and which should not be ignored. The Commission's position appears to be that public participation and consent does not matter,<sup>12</sup> that evidence can be disregarded, that an applicant does not need to produce requisite information, and that the applicant's burden of proof is optional.

AFCL requests that the Commission reconsider its decisions, stay issuance of the site permit amendment, and order an Environmental Assessment Worksheet and determine whether additional environmental review is necessary.

April 20, 2020



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Carol A. Overland #254617  
Attorney for AFCL  
Legalelectric  
1110 West Avenue  
Red Wing, MN 55066  
(612) 227-8638  
[overland@legalelectric.org](mailto:overland@legalelectric.org)

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<sup>12</sup> The Office of Legislative Auditor has initiated an evaluation of the Public Utilities Commission's public engagement process? For decades now, Power Plant Siting Act Annual Hearings have gathered input and documented complaints about public process and engagement, but those comments are lost in a black hole. The PUC has never so much as acknowledged the comments from the PPSA Annual Hearing or reviewed the record of PPSA Annual Hearing at an agenda meeting. Power Plant Siting Act rule updates, Minn. R ch. 7849 and 7850 were begun in 2012, now EIGHT years ago, in part addressing some issues raised, but are stalled. Now, it appears OLA is paying attention, but the report was due out in February... two months ago...

# Exhibit A

EQB Transmittal Letter to PUC

January 3, 2020

**Minnesota Environmental Quality Board  
520 Lafayette Road North  
Saint Paul, MN 55155**

VIA E-MAIL (cover letter & petition)

January 3, 2020

Bret Eknes  
Energy Facilities Supervisor  
Minnesota Public Utilities Commission

RE: Petition for an Environmental Assessment Worksheet for Freeborn Wind

Dear Mr. Eknes,

The Environmental Quality Board (EQB) has received a petition requesting that an Environmental Assessment Worksheet (EAW) be prepared for the project described in the petition, and has determined that the Minnesota Public Utilities Commission is the appropriate governmental unit to decide the need for an EAW.

The requirements for environmental review, including the preparation of an EAW, can be found in Minnesota Rules, chapter 4410. The procedures to be followed in making the EAW decision are set forth in part 4410.1100. Key points in the procedures include:

1. No final governmental approvals may be given to the project named in the petition, nor may construction on the project be started until the need for an EAW has been determined. Project construction includes any activities which directly affect the environment, including preparation of land. If the decision is to prepare an EAW, final governmental approval must be withheld until either a negative declaration on the need for an Environmental Impact Statement (EIS) is issued or an EIS is determined adequate. See part 4410.3100, subparts 1 and 2 for the prohibitions on final governmental decisions.
2. To make the decision on the need for an EAW, compare the project to the mandatory EAW, EIS, and exemption categories listed in parts 4410.4300, 4410.4400, and 4410.4600, respectively. If the project should fall under any of these categories, environmental review is automatically required or prohibited. If this should be the case, proceed accordingly:
  - a. If the project meets or exceeds the thresholds of any mandatory EAW or EIS category, then environmental review is required for the project. Please see the guidance documents on the [EQB website](#) for preparing an EAW or EIS.
  - b. If the project is exempt from environmental review, please document the reason for the exemption in writing and notify both the petitioners' representative and EQB of your conclusion.
3. If preparation of an EAW is neither mandatory nor exempted, the Minnesota Public Utilities Commission has the option to prepare a discretionary EAW in accordance with part 4410.1000, subpart 3, item B. The standard for making the decision on the need for an EAW is provided in part 4410.1100, subpart 6. When considering the evidence provided by the petitioners,

Mr. Eknes  
January 3, 2020

proposers, or other persons, the Minnesota Public Utilities Commission must take into account the factors listed in part 4410.1700, subpart 7. Note that this requires that a record of decision, including specific findings of fact, be maintained.

4. You are allowed up to 30 working days (Saturdays, Sundays and holidays do not count) for your decision if it will be made by a council, board, or other body which meets only periodically, or 15 working days if the decision will be made by a single individual. If the decision will be made by an individual, the individual may request an additional 15 working days from the EQB in accordance with part 4410.1100, subpart 7.
5. You must provide written notification of your decision to the proposer, the petitioners' representative, and the EQB, within 5 working days as described in part 4410.1100, subpart 8. Please provide written notification to these parties even in cases where an EAW or EIS will be prepared according to part 4410.1000, subparts 2 or 3, or the project is found to be exempt from environmental review.
  - a. To notify the EQB of your decision on the need for an EAW, complete the [EQB Monitor submission form](#) found on the EQB website. The EQB requests that you upload a copy of your record of decision using the same electronic submission form, including instances where environmental review is mandatory, voluntary, or exempt.
6. If for any reason you are unable to act on the petition at this time (e.g., no application has yet been filed or the application has been withdrawn or denied), the petition will remain in effect for a period of one year, and must be acted upon prior to any final decision concerning the project identified in the petition. It is recommended that you notify in writing both the petitioners' representative and the EQB if you are unable to act on the petition at the time it is received.

Notice of the petition and its assignment to your unit of government will be published in the *EQB Monitor* on January 6, 2020.

If you have any questions or need any assistance, please do not hesitate to call me. The telephone number is 651-757-2873.

Sincerely,

*Katrina Hapka*

Katrina Hapka  
Environmental Review Planner  
Environmental Quality Board

Enclosure

cc:

Carol Overland, Petitioner's Representative  
Christina Brusven, Project Proposer's Representative  
Lisa Agrimonti, Project Proposer's Representative  
Will Seuffert, EQB Executive Director

# Exhibit B

PUC email and Notice of Decision

February 13, 2020

**Subject:** Decision Notice on Freeborn Wind Project EAW Citizen's Petition

**From:** "Kaluzniak, Mike (PUC)" <mike.kaluzniak@state.mn.us>

**Date:** 2/13/2020, 3:18 PM

**To:** "Hapka, Katrina (EQB)" <Katrina.Hapka@state.mn.us>

**CC:** "Env Review (EQB)" <Env.Review@state.mn.us>, "Wilson, Denise (EQB)" <denise.wilson@state.mn.us>, "Carol A. Overland (overland@legalectric.org)" <overland@legalectric.org>, "Brusven, Christina" <CBrusven@fredlaw.com>, "Lisa Agrimonti (Lagrimonti@fredlaw.com)" <Lagrimonti@fredlaw.com>

Hi, Katrina -

Enclosed is a courtesy copy of the Commission's letter of notice on the Freeborn Wind Project EAW Citizen's Petition per Minn. R. 4410.1100, Subp 8. The document will be posted to the dockets 17-410 and 17-322 on the Commission's e-Docket system:

<https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=eDocketsResult&docketYear=17&docketNumber=410>.

Document ID	Class	Docket #	Subscribe	Docket Type	On Behalf Of	Document Type	Received Date
<a href="#">20202-160414-01</a>	PUBLIC	17-410		WS	PUC	LETTER--EQB	02/13/2020

As we discussed, I am unable to submit the letter via the EQB's Monitor webpage and will work with your colleague tomorrow to have up submitted as soon as possible.

Regards,

M

Michael Kaluzniak

Senior Energy Facility Planner | Energy Facility Permitting

Pronouns: He/Him/His

Minnesota Public Utilities Commission

121 7th Place E, Suite 350

Saint Paul, MN 55101-2147

O: 651-201-2257

F: 651-297-7073

[mn.gov/puc](http://mn.gov/puc)



**CONFIDENTIALITY NOTICE:** This message is only for the use of the individual(s) named above. Information in this e-mail or any attachment may be confidential or may be protected by state or federal law. Any unauthorized disclosure, use, dissemination, or copying of this message is prohibited. If you are not the intended recipient, do not read this e-mail or any attachments and notify the sender immediately. Please delete all copies of this communication.

— Attachments: —

17-410-A-2 5-day notice Rebholz signed.pdf

140 KB

**m** MINNESOTA  
PUBLIC UTILITIES COMMISSION

February 13, 2020

Katrina Hapka, Environmental Review Planner  
Environmental Quality Board  
520 Lafayette Road North  
Saint Paul, MN 55155

RE: Petition for an Environmental Assessment Worksheet for Freeborn Wind

Dear Ms. Hapka:

Enclosed is the Public Utilities Commission's response to the January 3, 2020 petition requesting preparation of an Environmental Assessment Worksheet (EAW) for the Freeborn Wind Project.

At its February 6, 2020 Agenda Meeting, the Commission made the following decision:

Deny the petition on the merits pursuant to Minn. R. 4410.1100, subp. 6, and 4410.1700, subp. 7.

Deny the petition pursuant to Minn. R. 4410.4300, subp. 3(D), and 7854.0500, subp. 7.

Authorize the Executive Secretary to issue a Record of Decision on the matter based on the enclosed draft version, incorporating any Commission modifications or technical corrections by staff.

Pursuant to Minn. R. 4410.1100, subp. 8, this letter serves as notice that the Commission has declined the request to prepare an EAW. The Commission will memorialize its decision and set forth its rationale by written order, and maintain a record of its decision on the need for an EAW.

Sincerely,

*Michelle Kuhnke for*

Will Seuffert, Executive Secretary

**m** MINNESOTA  
PUBLIC UTILITIES COMMISSION

Cc:

Carol Overland – Association of Freeborn County Landowners (e-Service)

Christina Brusven - Project Proposer's Representative (e-Service)

Lisa Agrimonti - Project Proposer's Representative (e-Service)

Matthew Harris - Xcel Energy (email)

Denise Wilson, Director - Environmental Review Program, MN EQB (email)

*EQB Monitor* (online submittal - <https://www.eqb.state.mn.us/eqb-monitor>)

Commission Docket Nos. E-002/WS-17-410 and E-002/TL-17-322

# Exhibit C

Court of Appeals Order

April 2, 2020

STATE OF MINNESOTA  
IN COURT OF APPEALS

**FILED**

April 2, 2020

OFFICE OF  
APPELLATE COURTS

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In the Matter of Freeborn Wind Energy  
LLC's Application for a Large Wind  
Energy Conversion System Site Permit  
for the 84 MW Freeborn Wind Farm in  
Freeborn County.

**O R D E R**

**A19-1195**

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In the Matter of Freeborn Wind Energy  
LLC's Application for a Large Wind  
Energy Conversion System Site Permit  
for the 84 MW Freeborn Wind Farm in  
Freeborn County.

**A20-0410**

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**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:**

1. On July 30, 2020, relator Association of Freeborn County Landowners filed a certiorari appeal (A19-1195) seeking review of orders issued by respondent Minnesota Public Utilities Commission (the commission) on May 10, 2019, and July 2, 2019, pertaining to a site application permit filed by Freeborn Wind Energy LLC (Freeborn Wind) to construct wind turbines and related facilities in Freeborn County.

2. In June 2019, Northern States Power Company, d/b/a Xcel Energy (Xcel), acquired Freeborn Wind. On August 20, 2019, Xcel filed with the commission a site-permit-amendment application for the Freeborn Wind project.

3. In an October 1, 2019 order, a special term panel of this court granted relator's motion to stay processing of appeal A19-1195 pending the commission's final ruling on the site-permit-amendment application.

4. On March 18, 2020, relator filed a new certiorari appeal (A20-0410) from the commissioner's decision at its February 6, 2020 meeting to deny relator's petition for an environmental-assessment worksheet (EAW) pertaining to the Freeborn Wind project.

5. A person aggrieved by a final decision on the need for an EAW, the need for an environmental-impact statement, or the adequacy of an environmental-impact statement is entitled to judicial review of the decision under sections 14.63 to 14.68. Minn. Stat. § 116D.04, subd. 10 (2018). A petition for writ of certiorari by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the court of appeals and served on the responsible governmental unit not more than 30 days after the responsible governmental unit provides notice of the final decision in the EQB Monitor. *Id.*

6. Relator's statement of the case in appeal A20-0410 indicates that the commission's decision on the EAW is not final because the commission has not yet issued a final order reflecting the decision. Relator indicated that it was required to file a certiorari appeal because notice of the commission's decision at the February 6, 2020 meeting was published in the EQB Monitor on February 18, 2020.

7. On March 29, 2020, relator filed a motion to consolidate appeals A19-1195 and A20-0410.

8. On March 31, 2020, the commission issued a written order addressing both relator's petition for an EAW and the petition to amend the site permit. The March 31,

2020 order denies the petition for an EAW and grants the petition for an amended site permit.

9. Within 20 days after service by the commission of any decision constituting an order or determination, any party to the proceeding and any other person, aggrieved by the decision and directly affected thereby, may apply to the commission for a rehearing regarding any matter determined in the decision. Minn. Stat. § 216B.27, subd. 1 (2018). No cause of action arising out of any decision constituting an order or determination of the commission for any proceeding for judicial review shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding made a timely application for rehearing. *Id.*, subd. 2.

10. The parties agree that appellate review of the March 31, 2020 order is premature in view of the requirement to file a petition for rehearing under Minn. Stat. § 216B.27, subd. 1.

**IT IS HEREBY ORDERED:**

1. Appeal A20-0410 is dismissed as a premature appeal. The writ of certiorari in appeal A20-0410 is discharged.

2. Relator may obtain review of the March 31, 2020 order denying relator's petition for an environmental-assessment worksheet and approving the amended site permit in a timely certiorari appeal after the Minnesota Public Utilities Commission rules on relator's timely petition for rehearing under Minn. Stat. § 216B.27, subd. 1. Relator's filing fee for a future certiorari appeal from the final order on reconsideration shall be

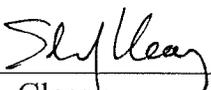
waived. Relator shall file a copy of this order with the appeal documents for the future certiorari appeal.

3. Relator's motion to consolidate appeals A19-1195 and A20-0410 is denied as moot.

4. Relator's counsel shall continue to file status letters in appeal A19-1195 as directed by this court's October 1, 2019 order.

**Dated:** April 2, 2020

**BY THE COURT**

  
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Edward J. Cleary  
Chief Judge