STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF RAMSEY	**SECOND JUDICIAL DISTRICT**
	CASE TYPE: Civil Other/Misc
	Judge: The Honorable Sara R. Grewing Court File Number: 62-CV-20-3674

State of Minnesota, ex. rel., Association of Freeborn County Landowners, Plaintiff, vs. Minnesota Public Utilities Commission, Defendant.	**ASSOCIATION OF FREEBORN COUNTY LANDOWNERS' RESPONSE TO MOTIONS TO DISMISS OF DEFENDANTS MINNESOTA PUBLIC UTILITIES COMMISSION; NORTHERN STATES POWER COMPANYAND PLUM CREK WIND; AND BUFFALO RIDGE WIND AND THREE WATERS WIND**

Plaintiff Association of Freeborn County Landowners (hereinafter "AFCL") submits this response to the Motions to Dismiss of Defendants Public Utilities Commission, Northern States Power and Plum Creek Wind, and Buffalo Ridge Wind and Three Waters Wind. The Public Utilities Commission dockets are all accessible online. AFCL incorporates its Complaint as if fully related herein.

THE LEGAL STANDARD

Defendants argue that AFCL has failed to state a claim in their Motions to Dismiss. The threshold for a Motion to Dismiss is high – the Motion **must** be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." N. States Power Co. v. Minnesota Metro. Council, 684 N.W.2d 485, 490 (Minn. 2004). When the court considers these motions to dismiss, the facts of the Complaint and "only

those facts alleged in the complaint," are to be regarded as true and the Court shall grant all reasonable inferences in favor of the non-moving party. *In re Individual 35W Bridge Litigation,* 806 N.W.2d 820, 826-827(Minn. 2011); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 229 (Minn. 2008).

Defendants argue that the District Court does not have jurisdiction. See e.g., Buffalo Ridge/Three Waters Memorandum, p. 6. MERA does confer jurisdiction. Minn. Stat. §116B.10, Subd. 1 (… may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency where the nature of the action is a challenge to an environmental quality standard… rule… order… or permit promulgated or issued by the state or any agency… for which the applicable statutory appeal period has elapsed.).

Defendants want to insert additional evidentiary documents into this record, but the Court is restricted to review only the Complaint and statements made in the Complaint. N. States Power Co. v. Minnesota Metro. Council, 684 N.W.2d 485, 490 (Minn. 2004). AFCL asks, in specifics below, that these relevant documents not be considered and be stricken at this time[1].

Despite the arguments of the Defendants, this Complaint is not about the individual permitting decisions or actions of the Public Utilities Commission. Defendant erroneously claims that, 'a MERA action is viable only when a plaintiff proves that an action is "inadequate to protect the air, water, land, or other natural resources located within the state *from pollution, impairment, or destruction*." Minn. Stat. § 116B.10, subd. 2 (emphasis added).' NSP Memorandum, p. 26; see also Buffalo Ridge/Three Waters Memorandum, p. 13. However, BR/TW and NSP's snippet does

[1] These thousand and more pages attached to Defendants' Affidavits impermissibly crowd and confuse the record. AFCL has no objection whatsoever to Defendants' inclusion of these public record documents when the merits of this case are addressed if/as it goes forward. These documents go a long way towards proving AFCL's case, documenting the exhaustive efforts made by AFCL and others to address the systemic large wind siting issues encountered at the Public Utilities Commission.

not convey the statutory language and the civil action against the state that the statute provides. The statute says:

> In any action maintained under this section the plaintiff shall have the burden of proving that **the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit is inadequate to protect the air, water, land, or other natural resources** located within the state from pollution, impairment, or destruction. The plaintiff shall have the burden of proving the existence of material evidence showing said inadequacy of said environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit.

Minn. Stat. § 116B.10, subd. 2 (emphasis added); see also Buffalo Ridge/Three Waters' selective quotes, Memorandum, p. 13. It is the statutes, rules, and standards, and the lack thereof, that are insufficient to protect the air, water, land, or other natural resources from pollution, impairment or destruction. AFCL's complaint is not a specific challenge of a permit decision, the sort of challenge prohibited in a Minn. Stat. § 116B.03 action. This is a Complaint brought to address systemic flaws, fatal flaws, MEPA violating flaws, in the Commission's failure to comply with statutes, failure to promulgate rules, exempting rather than requiring environmental review, and using inapplicable standards for siting wind projects.

This MERA action is a civil action against the state, where state agency's statutes, rules, and standards are insufficient to protect the environment, including humans living within a project area; where the state has not developed siting criteria and standards sufficient to protect the people and environment of the project area; and where the state refuses to promulgate rules and/or standards as mandated by the legislature. See Minn. Stat. § 116B.10.

The matters raised in the Complaint concern the Public Utilities Commission's systemic failure to comply with the directive of the Minnesota Environmental Policy Act to conduct environmental review for a project where there is "potential for significant environmental effects resulting from any major governmental action;" failure to comply with the legislative mandate to

develop rules, including specifically "criteria that the commission shall use to designate sites, which must include the impact of LWECS on humans and the environment," and rules for "requirements for environmental review of the LWECS." Minn. Stat. §216F.05. The point of this Complaint is to stop the continuing train-wreck of the Commission's permitting wind projects without large-wind specific siting criteria and standards[2]. Yes, these claims have been raised repeatedly in individual permitting dockets, to no avail, and largely because individual dockets are not the venue to address these systemic problems. MERA provides jurisdiction.

Defendants, each of them, claim that AFCL's repeated statement that "there are no large-wind specific rules" is not true, yet none can cite rules or standards for Large Wind Energy Conversion Systems. Rather than cite specific rules or standards, they refer generically to the Commission's wind rules found in Minn. R. ch. 7854 and the 2008 small wind standards (MPUC Docket M-08-1102). The defendants cannot cite wind specific siting criteria for Large Wind Energy Conversion Systems, instead they can only site the non-wind criteria of the Power Plant Siting Act. Minn. Stat. §216E.03, Subd. 7.[3] The defendants cannot deny the wind related Public Utilities Commission filings demonstrating that wind projects do have significant environmental effects and that the rules and regulatory regime are inadequate to protect humans and the environment. For example, the Defendants cannot refute the Bent Tree wind project noise monitoring noise studies performed and replicated by Commerce-EERA showing non-compliance

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[2] Defendants argue that AFCL must exhaust administrative remedies in the individual dockets. See e.g., Defendant Buffalo Ridge/Three Waters Memorandum, p. 10-12. This is not "an apprehension that the agency decision will be unfavorable." Appeal via Certiorari of the many individual permits after intervention is an absurd interpretation because while the individual dockets and decisions within them are problematic, the larger picture of lack of large wind specific criteria and rules and lack of environmental review due to improper exemption cannot and will not be addressed in the individual dockets. Further, it places a tremendous burden on the general public, which is largely unaware of these problems, cannot afford to intervene and participate at the level necessary to raise these issues, and does not have an understanding of the decades long history of large and small wind siting in Minnesota.

[3] Despite the express applicability of Minn. Stat. §216E.03, Subd. 7, the PPSA criteria is not large wind specific and doesn/t address matters such as setbacks from residences, roads, property lines, shadow flicker, decommissioning, etc.

with the state's industrial noise standards. The defendants cannot refute Alliant's settlement agreement with landowners within the Bent Tree wind project. The defendants cannot refute the fact that since the Administrative Law Judge's recommendation that the Freeborn Wind project application be denied because Freeborn Wind had not demonstrated that it could comply with the state's industrial noise standard, some wind projects are no longer providing pre-construction noise modeling using the elevated-noise-source wind-specific ground factor of 0.0, and instead are improperly using ground factors of 0.5 and 0.7 to understate the proposed project's noise.

Minn. Stat. § 116B.10 provides a cause of action to address the Commission's failure to adequately protect the environment through statutes, rules, and standards.

I. AFCL'S CLAIM IS ACTIONABLE UNDER MERA AND THE DISTRICT COURT HAS JURISDICTION.

The Commission argues that AFCL's claim is not actionable under MERA and that the district court has no jurisdiction. The plain language of the Minnesota Environmental Rights Act says otherwise:

> **CIVIL ACTION AGAINST STATE.**
>
> ***Subdivision 1. Civil actions.***
>
> As hereinafter provided in this section, any natural person residing within the state; … or any … association, organization, or other legal entity having … members… residing within the state may maintain a civil action in the district court for declaratory or equitable relief against the state or any agency or instrumentality thereof **where the nature of the action is a challenge to an environmental** … **standard** … **rule … pr**omulgated or issued by the state or any agency or instrumentality thereof **for which the applicable statutory appeal period has elapsed.**[4]
>
> ***Subd. 2.Burden of proof.***
>
> In any action maintained under this section the plaintiff shall have the burden of proving that the environmental quality standard, limitation, rule, order, license, stipulation

[4] Defendant Buffalo Ridge/Three Waters misunderstands the statute, claiming that AFCL's challenge is not timely. Defendant Buffalo Ridge/Three Waters Memorandum, p. 18.

agreement, or permit is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction. The plaintiff shall have the **burden of proving the existence of material evidence showing said inadequacy of said environmental quality standard**, limitation, **rule**, order, license, stipulation agreement, or permit.

Subd. 3.Remittitur; judicial review.

In any action maintained under this section the district court, **upon a prima facie showing by the plaintiff of those matters specified in subdivision 2, shall remit the parties to the state agency or instrumentality that promulgated the environmental quality standard,** limitation, **rule**, order, license, stipulation agreement, or permit which is the subject of the action, **requiring said agency or instrumentality to institute the appropriate administrative proceedings to consider and make findings and an order on those matters specified in subdivision 2**. In so remitting the parties, the court may grant temporary equitable relief where appropriate to prevent irreparable injury to the air, water, land, or other natural resources located within the state. In so remitting the parties, the court shall retain jurisdiction for purposes of judicial review to determine whether the order of the agency is supported by the preponderance of the evidence. If plaintiff fails to establish said prima facie showing, the court shall dismiss the action and award such costs and disbursements as the court deems appropriate.

Minn. Stat. §116B.10 (emphasis added), see AFCL Complaint, p 2.

Defendant PUC does not even mention Minn. Stat. §116B.10 in its Motion to Dismiss Memorandum. No argument is made in its brief that AFCL has failed to state a claim for its civil action against the state as provided by Minn. Stat. §116B.10.

Defendant Buffalo Ridge/Three Waters misguidedly states that "Plaintiff's Complaint Improperly Challenges Promulgated Rules under MAPA" and that "this court is not the proper forum for Plaintiff's attach on Minn. R. 7854.0500. The plain language of the statute says it is the proper forum. Minn. Stat. §116B.10, Subd. 1. Buffalo Ridge/Three Waters Memorandum, p. 17-21. Defendant succinctly identifies the problem, that this inadequate "regulatory regime for wind permitting" … "has been in place for decades. Hundreds of wind projects have been … sited… under these rules." Buffalo Ridge/Three Waters Memorandum, p. 18.

Defendant NSP/Plum Creek states that "The Minnesota Court of Appeals has already squarely rejected the use of MERA to challenge whether MPUC's environmental review complies with MEPA in similar circumstances," and relies on a decision regarding a MERA claim under Minn. Stat. §116B.03, where the court found that indeed a claim had been made under Minn. Stat. 116B.10 and that claim under Minn. Stat. 116B.10 went forward in the district court, and the appellate cases were regarding stating a claim under Minn. Stat. §116B.03. In the case cited by NSP, the Court also found that a claim had also been sufficiently stated under Minn. Stat. §116B.03! Defendant NSP/Plum Creek misleadingly fails to address that the appellate court upheld the District Court's decision that "the associations had made a prima facie showing under Minn. Stat. §116B.10 (2018), however, and remanded the MERA claims to the district court for remittitur to institute DNR administrative proceedings." White Bear Lake Restoration Ass'n ex rel. State v. Minn. Dep't of Nat. Res., 928 N.W.2d 351, 368 (Minn. App. 2019). In the second case of the two, the one cited by NSP, the DNR was arguing for "the action to proceed under Minn. Stat. §116B.03 instead of Minn. Stat. §116B.10…" Id., 358. AFCL's case states a claim under Minn. Stat. §116B.10.

This is not an action under Minn. Stat. §116B.03[5]. The Defendants should note that in the first case it was expressly stated, "The parties agree that relief is available under section 116B.10." Id., fn. 8. The previous case affirmed the District Court's finding that the White Bear Lake Restoration Association had stated a claim under MERA's Minn. Stat. §116B.10. It also supports the remedy of Minn. Stat. §116B.10's remittitur to the Commission.

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[5] Similarly, the PUC cited *State ex rel. Rice Cty. Land Use Accountability, Inc. v. Rice Cty.*, No. A06-1041, 2007 WL 1470417, at 1 (Minn. App. May 22, 2007), which was another MERA case based on a Minn. Stat. §116B.03 action. It was not a Minn. Stat. §116B.10 civil action against the state, though it likely should have been. Commenting on the multiple instances of the County's flagrant disregard for environmental law, the District Court judge stated, "They know the law, I don't have to tell them the law." The RCLUA case does not support Defendant PUC's argument that AFCL's case based on Minn. Stat. §116B.10 fails to state a claim.

Defendants' use of the White Bear Lake cases is disingenuous. The point of these cases is whether White Bear Lake Restoration Association stated a MERA claim under Minn. Stat. §116B.03, and the requirements to state a sufficient claim. It is not about stating a claim under Minn. Stat. §116B.10. MERA provides for challenge of a statute, rule, and permit where the time for appeal has lapsed, either appeal of the original rule or a rulemaking petition. Minn. Stat. §116B.10 Subd. 2. Rather than make their case for dismissal, use of the White Bear Lake cases instead support AFCL's use of MERA in challenging the Public Utilities Commission's failure to promulgate rules and practice and procedure of issuing permits where there are no rules, and issuing permits where there are no rules is insufficient to protect the environment.

II. DEFENDANTS' MISGUIDEDLY ARGUE THAT THE COMMISSION'S "ENVIRONMENTAL REVIEW" OF WIND PROJECTS IS ADEQUATE UNDER MEPA THEREFORE AFCL's CLAIM IS PROHIBITED.

The Defendants argue that there is no MERA claim where environmental review is determined to be adequate under MEPA and that therefore AFCL's Complaint should be dismissed. See NSP Memorandum, p. 23; PUC p. 22-23, 24-25. Defendants and each of them cite no case law or statute supporting their position. Defendants statements rely on rule language stating that the "environmental review" referred to in Minn. R. 7854.0500, Subp. 7 is adequate under MEPA. However, no court has determined that Minn. R. 7854.0500, Subp. 7 constitutes environmental review compliant with MEPA. There has been no determination that the "application content" of Minn. R. 7854.0500 is adequate environmental review, and to the contrary, the Commission routinely deems applications "complete" despite application content requirements not having been met.

As AFCL stated in its Complaint, in 1995 the legislature mandated the agency, then The Environmental Quality Board, to develop rules, expressly including:

(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[6].

Defendants refer to the 2001 rulemaking proceeding and cite to the Statement of Need and Reasonableness (SONAR), as did AFCL in its Complaint, but the SONAR is referenced for very different reasons. See e.g., NSP Memorandum, Exhibit 2, *In the Matter of the Proposed Adoption of Rules Governing the Siting of Large Wind Energy Conversion Systems*. AFCL notes that in this Statement of Need and Reasonableness, there is no development of the legislatively mandated "criteria that the commission shall use to designate LWECS sites, which must include the impact of LWECS on humans and the environment, nor is there "requirements for environmental review of the LWECS." Id. Instead, the SONAR is rife with unsupported conclusory statements that wind projects will have no significant environmental impact! From the EQB's Statement of Need and Reasonableness (SONAR)(2001) regarding its content rule exempting wind from environmental review, now Minn. R. 7854.0500, Subp. 7:

> **Subpart 7. Environmental impacts.** Of course, the EQB must investigate and review the environmental impacts associated with any proposed wind project. The applicant is the one that must provide the information about the potential impacts of the project. What this rule requires is the inclusion in the application of information on the potential impacts of the project, the mitigative measures that are possible, and adverse environmental effects that cannot be avoided. This is the typical analysis with any project undergoing environmental review by the EQB or other agencies.
>
> The effects identified in items A – R in the rule should cover every potential impact of a LWECS. It is not necessary to discuss every single one of these in this Statement of Need and Reasonableness. Suffice it to say that an applicant must identify any and all potentially adverse impacts that may be caused by a proposed project and mitigative measures that might be implemented with regard to those impacts.

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[6] See Legislative History, **1995 c 203 s 5; 2005 c 97 art 3 s 19.**

> Wind projects have not been found to have significant environmental and human impacts. Wind projects along Buffalo Ridge have been generally well accepted by residents and others concerned about the environment. Permit conditions have been satisfactory to address specific concerns like wetlands and wildlife management areas with past permits. One area of concern that was raised initially was the possibility of avian fatalities caused by the turbines.
>
> As part of the first wind permit issued by the EQB, the Board required Northern States Power Company to conduct an avian mortality study along Buffalo Ridge. This study was conducted between 1995 and 2000, and a report on the study was completed in 2000.
>
> The researchers found that the number of avian fatalities from the wind turbines at Buffalo Ridge is essentially inconsequential, although there was some bat mortality found. The wind developers are presently conducting additional studies on bat mortality. 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.

NSP Memorandum, Ex. 1, SONAR, p. 19-20.

The PUC claims, similarly to NSP/Plum Creek and Buffalo Ridge/Three Waters, that "However, through Minn. Stat. § 116D.04, subd. 4a, the Legislature has authorized the EQB to provide alternative methods of environmental review besides an EIS. LWECS are one of the projects for which an alternative form of environmental review exists." PUC Memorandum, p. 4; NSP fn. 2, p. 3; Buffalo Ridge/Three Waters Memorandum, p. 20. This is another misrepresentation in at least two ways. First, many types of projects are listed as qualifying for alternative review, but wind is not one of the types of projects listed. Minn. Stat. §216E.04, Subd. 2. Further, the SONAR cited by NSP and PUC makes no claim to be "alternate environmental review." Id. This rule, Minn. R. 7854.0500, Subp. 7, is an **exemption** from environmental review,

specifically, an exemption from an Environmental Impact Statement and Environmental Assessment Worksheet. Exemption from review is not an "alternative method" of environmental review – it is absence of environmental review.

The rule promulgated in 2001 is an "application content" rule listing what the applicant should include in its application:

> **Subp. 7. Environmental impacts.**
> An applicant for a site permit shall include with the application an analysis of the potential impacts of the project, proposed mitigative measures, and any adverse environmental effects that cannot be avoided, in the following areas:
>
> A. demographics, including people, homes, and businesses;
> B. noise;
> C. visual impacts;
> D. public services and infrastructure;
> E. cultural and archaeological impacts;
> F. recreational resources;
> G. public health and safety, including air traffic, electromagnetic fields, and security and traffic;
> H. hazardous materials;
> I. land-based economics, including agriculture, forestry, and mining;
> J. tourism and community benefits;
> K. topography;
> L. soils;
> M. geologic and groundwater resources;
> N. surface water and floodplain resources;
> O. wetlands;
> P. vegetation;
> Q. wildlife; and
> R. rare and unique natural resources.
>
> The analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D. No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project.

Minn. R. 7854.0500 Application contents. The PUC falsely claims that this rule "directs the MPUC to analyze the environmental impacts of the proposed LWECS on eighteen substantive areas. 7854.0500, subp. 7." PUC Memorandum, p. 4. This statement is not true – there is no

directive to the PUC to analyze this information, and instead, the rule declares the application content an "analysis" and states that no further analysis is necessary.

NSP also raises the rules developed, and states:

> Mirroring the EQB's approved alternative review process, the MPUC siting rules state: "The analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D." Minn. R. 7854.0500 subp. 7. "No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project." *Id.*

NSP Memorandum, p. 3-4.

Mirroring the EQB's approved review process? The rulemaking evidenced in the SONAR and resulting environmental review exemption of Minn. R. 7854.0500, subp. 7 does nothing of the sort. NSP claims "EQB indisputably developed LWECS siting rules and built environmental review into the application and review process. 2001 SONAR, Huyser Decl. Ex. 2; Minn. R. Ch. 7854." NSP Memorandum, p. 17. NSP claims "AFCL's argument, therefor, is to the form" of the environmental review – namely that it is not in the form of an EAW or EIS." Id. No, this is not AFCL's argument or objection. AFCL objects to the lack of substance, the lack of wind-specific siting criteria and rules, the lack of a public iterative process, not the "form." Application content is not "alternate review."

The statute authorizing "alternate review" shows that alternate review is something very different than what is found in Minn. R. 7854.0500, Subd. 7. The "alternate review of applications" requires, not exempts, environmental review:

> ***Environmental review.***
>
> For the projects identified in subdivision 2 and following these procedures, the commissioner of the Department of Commerce shall prepare for the commission an environmental assessment. The environmental assessment shall contain information on the human and environmental impacts of the proposed project and other sites or routes identified by the commission and shall address mitigating measures for all of the sites or routes considered. The environmental assessment

> shall be the only state environmental review document required to be prepared on the project.

Minn. Stat. §216E.04, Subd. 5. Under alternate review, a public hearing is also required, giving it an iterative review. Id., Subd. 6. As above, the statute lists those projects to which alternate review applies, and wind projects are **not** listed. Minn. Stat. §216E.04, Subd. 2. The application-content rule exempting wind projects from an EIS and/or EAW is deemed, improperly, by the PUC and NSP an "alternate" or "alternative" review, despite the language of Minn. Stat. §216F.02 which excludes the statute allowing for alternate review, Minn. Stat. §216E.04, from application to wind projects.

In another gross misrepresentation regarding rules and standards, NSP states:

> On January 11, 2008, the Commission issued its *Order Establishing General Wind Permitting Standards*, adopting its "General Wind Turbine Permit Setbacks and Standards for LWECS Facilities Permitted by Counties Pursuant to Minnesota Statute 216F.08." Huyser Decl., Ex. 3. The Order establishes general minimum requirements for spacing, setbacks, noise standards, along with other specific requirements. Establishing the minimums by Order allows the Commission to retain the discretion to adjust permit conditions on a case-by-case basis, which it does. *See infra* at IV (discussing rationale for not promulgating the standards as rules).

NSP Memorandum, p. 4.

These standards cited above are for SMALL WIND, projects under 25MW and for those projects under 25 MW to be permitted by counties under their limited jurisdiction. NSP fails to include the word "SMALL" in its narrative above, and misleadingly implying that these are applicable to LWECS. Id. This is disingenuous.

What is "small wind?" From the PUC's wind statutory chapter:

> ***Subd. 2.Large wind energy conversion system or LWECS.***
>
> "Large wind energy conversion system" or "LWECS" means any combination of WECS with a combined nameplate capacity of 5,000 kilowatts or more.

Subd. 3.Small wind energy conversion system or SWECS.

"Small wind energy conversion system" or "SWECS" means any combination of WECS with a combined nameplate capacity of less than 5,000 kilowatts.

Minn. Stat. §216F.01, Definitions.

The Commission's *Order Establishing General Wind Permitting Standards* expressly states the applicability of these standards to only **SMALL** wind and county projects under 25MW, not the wind projects over 25 MW over which the Commission has jurisdiction:

1. The Commission herein adopts the Large Wind Energy Conversion System General Wind Turbine Permit Setbacks and Standards proposed by the Department of Commerce Energy Facility Permitting staff, attached as Exhibit A. The general permit standards shall apply to large wind energy conversion system site permits issued by counties pursuant to Minn. Stat. 216F.08 and to permits issued by the Commission for LWECS with a combined nameplate capacity of less than 25,000 watts.

Order Establishing General Wind Permitting Standards, adopting its "General Wind Turbine Permit Setbacks and Standards for LWECS Facilities Permitted by Counties Pursuant to Minnesota Statute 216F.08." NSP Motion to Dismiss, Huyser Decl., Ex. 3

This small-wind standards Order was AFCL's Exhibit 8 in the Freeborn Wind contested case, used to demonstrate the inapplicability of these expressly **SMALL** wind standards to **LARGE** wind projects such as Freeborn Wind, and the repeated improper use of these standards by the Commission in siting **LARGE** wind projects. Nonetheless, the Commission uses these standards, cited in nearly every LWECS siting permit.

Neither Defendant can cite to any finding in any court that the application content requirements of Minn. R. 7854.0500 constitute sufficient environmental review under MEPA. Further, AFCL's action is that environmental review of wind project is non-existent, not inadequate.

On the other hand, the case cited by both PUC and NSP that "when MEPA is satisfied, a MERA claim necessarily fails as a matter of law," is inapplicable to AFCL's Complaint:

> *See Minn. Ctr. for Evtl. Advoc. v. Minn. Pub. Utils. Comm'n,* No. A-10-812, 2010 WL 5071389, at * 9 (Dec. 14, 2010) (finding environmental advocacy group barred from raising new environmental claims in MERA action, where the claims were not presented to MPUC for reconsideration under Minn. Stat. § § 216B.27 and stating that "***[n]o cause of action*** arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petition in the action or proceeding" sought timely reconsideration. (quoting Minn. Stat. § 216B.28, subd. 2))) [hereinafter *MCEA v. MPCA*].

NSP Memorandum, p. 21, see also PUC p. 22-. NSP has it backwards, as the court found that "[b]ecause MCEA raised the adequacy of MPUC"s environmental review in its petition for reconsiderationof the permitting decision, the MERA claim is not procedurally barred. See § 216B.27, subd. 2." *Minn. Ctr. for Evtl. Advoc. v. Minn. Pub. Utils. Comm'n,* No. A-10-812, 2010 WL 5071389, at 19 (Dec. 14, 2010). The reason for barring the action under MERA was:

> But the reason that the MERA claim against MPUC is not procedurally barred is because the claim and MCEA"s petition for reconsideration are based on identical grounds: MPUC's alleged failure to conduct adequate environmental review under MEPA. And because MCEA alleges inadequate environmental review as the basis for its MERA claim, the claim entails assessment of MPUC"s environmental review. But MEPA, rather than MERA, is the "appropriate vehicle" with which to challenge the adequacy of MPUC's environmental review "where the agency's role is limited only to conducting environmental review of the project at issue." See Nat'l Audubon Soc. v. Minnesota Pollution Control Agency,569 N.W.2d 211, 213, 219 (Minn. App. 1997) (concluding that where plaintiffs were challenging an agency's environmental-review decision and the agency's role was limited to conducting the required environmental review of the project, plaintiffs' challenge must be brought under MEPA and not MERA), review denied(Minn. Dec. 16, 1997). Accordingly, MCEA may not maintain its claim against MPUC under MERA. See id. at 219.

Id. In short, the MCEA case was dismissed because it was environmental review in a specific project that was challenged under MERA and not MEPA; and it is not about statutes and rules inadequate to protect the environment; failure to conduct environmental review despite actual and constructive notice of substantial impacts; improper exemption from environmental review by rule; or whether there were or were not arguments raised in project specific requests for reconsideration; whether there is environmental review process deemed MEPA compliant; or

whether the environmental review process is formally deemed "alternative environmental review."

III. REMITTUR FOR RULEMAKING IS NECESSARY TO COMPLY WITH THE LEGISLATIVE MANDATE AND ESTABLISH LARGE WIND SPECIFIC CRITERIA AND STANDARDS SUFFICIENT TO PROTECT THE HUMAN AND ENVIRONMENTAL RESOURCES.

The relief provided for in a MERA cause of action against the state includes that the court "shall remit the parties to the state agency or instrumentality that promulgated the environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit which is the subject of the action, requiring said agency or instrumentality to institute the appropriate administrative proceedings to consider and make findings and an order on those matters specified in subdivision 2." Minn. Stat. §116B.10, Subd. 3.

As AFCL's Complaint states, the Commission notes, multiple attempts have been made to trigger rulemaking for Large Wind Energy Conversion Systems (LWECS). PUC Memo, p. 10. At least two wind siting rulemaking petitions have been presented to the Commission, and denied by the Commission. The most recent was in 2018. See PUC Docket E999/R-18-518. A separate rulemaking petition was presented to the Pollution Control Agency, and it as rejected as well. AFCL Complaint, p. 7, fn. 7[7]. Despite lack of rules and standards, the Commission continues with permitting wind projects.

A primary point the PUC, and the other Defendants, fail to note is that the rules adopted in 2002, Minn. Ch 7854, do not contain siting criteria and do not contain standards and do not set requirements for environmental review. There are no wind specific setbacks for large wind projects, only standards developed in 2008 for small wind projects under 25 megawatts. Complaint, para. 53 and fn. 13. These standards were adopted for small wind projects and not for

[7] MPCA/Stine Letter to Overland, September 12, 2016 (PUC eDocket ID **20169-124844-01**).

LWECS.

As stated in the Complaint, small wind siting standards were developed in 2007-2008 for projects under 25 MW.[8] In siting Large Wind Energy Conversion Systems (LWECS), the Commission, and its agent, Commerce-EERA, have routinely since 2008 improperly utilized the small wind siting standards, in particular the setbacks measured in turbine rotor diameter, setbacks from residences, setbacks from roads, etc.[9] None of the Defendants have cited to LWECS specific siting criteria and rules, and none of them can. A citation to Minn. R ch. 7854 is misleading, because there is no LWECS specific siting criteria and rules. None of the Defendants have cited to requirements for environmental review of the LWECS… and none of them can. What the Defendants can and do cite to is the statement that "No environmental assessment worksheet or environmental impact statement shall be required on a proposed LWECS project." Minn. R. 7854.0500, Subd. 7. Their citation to Minn. R. 7854.0500, Subd. 7 is misleading, because this is the rule governing Application Contents, a laundry list of information the applicant is to include in its application. Application content is not environmental review.

There are no large wind specific siting criteria or rules – and though Defendants repeatedly criticize AFCL for this statement and claim it is false, not one of the Defendants has cited to large-wind specific wind siting criteria and/or standards. The small wind standards are not applicable to large wind projects, and a quick review of Minn. R. ch. 7854 demonstrates that there are no large wind standards and siting criteria.

IV. DEFENDANTS EXHIBITS NOT REFERENCED IN AFCL'S COMPLAINT SHOULD NOT BE CONSIDERED BY THE COURT.

Defendants PUC and NSP have filed numerous exhibits attached to its Motion to Dismiss

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[88] See Order Establishing Small Wind Permit Standards Under 25MW, PUC Docket M-07-1102 (PUC #**4897855**).
[99] Id., see chart, Exhibit A (beginning p. 8 of 28).

and Affidavit. Defendant PUC states in a footnote that:

> The Commission dockets are public record and may be accessed here: https://www.edockets.state.mn.us/. In ruling on a motion to dismiss, a court may consider documents attached to or referenced in the complaint, as well as public records, without converting a motion to dismiss into a motion for summary judgment. *N. States Power Co. v. Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004); *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). The Commission dockets discussed herein are referenced in AFCL's Complaint and contain public documents that are central to the claims alleged. Accordingly, the Court may properly consider the documents attached to the Affidavit of Jeffrey K. Boman ("Boman Aff.") upon this Motion to Dismiss.

PUC Memorandum, fn. 3, p. 5 and Affidavit of Boman.

Defendant PUC appears to want all documents attached to its Affidavit considered, as presumably does NSP, as a part of its Motion to Dismiss, and that its Motion not be treated as a Motion for Summary Judgment. The number of exhibits attached to the Affidavits that are not referenced in AFCL's Complaint are many. However, what was filed by all the Defendants are "Motions to Dismiss," for judgment on the pleadings, meaning the AFCL Complaint. The cases cited by Defendant PUC say something quite different than the PUC's footnote when interpreting Minn.R.Civ.P. 12.02, stressing that it is error to consider such exhibits and not treat the Motion as a Summary Judgment:

> As a threshold matter, we must determine whether the district court erred when it considered the Hunter and Kucera affidavits in ruling on MnDOT and the Met Council's motions to dismiss. A Rule 12.02 motion to dismiss for failure to state a claim upon which relief can be granted will be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *N.S.P. Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). Rule 12.02 provides that such a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded. We have noted, however, that a court may consider documents referenced in a *complaint* without converting the motion to dismiss to one for summary judgment. *See Martens v.* **[684 N.W.2d 491]** *Minnesota Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n. 7 (Minn.2000).
>
> MnDOT cites *Martens* for the proposition that a court may consider any document

attached to any pleading on a motion to dismiss. MnDOT argues that, because the Hunter affidavit was attached to and referenced in its motion to dismiss, the district court properly considered the affidavit without converting the motion to one for summary judgment.

MnDOT's reliance on *Martens* is misplaced. Rule 12.02 states:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * *.

(Emphasis added.) Under a plain reading of this language, it is clear that the referenced "pleading" is the pleading that is the subject of the motion to dismiss. In *Martens,* we limited "our review to the particular documents and oral statements referenced in the complaint," the pleading that was the subject of the motion to dismiss. 616 N.W.2d at 739 n. 7. Here, the affidavits considered by the district court were not referenced in or a part of the pleading that was the subject of the motion to dismiss. Thus, having considered the affidavit, it was error for the district court not to have treated the motion as one for summary judgment under Rule 56.

N. States Power Co. v. Metropolitan Council, 684 N.W.2d 485, 490 (Minn. 2004).

Attached to the PUC's Motion and Affidavit are numerous exhibits **not** referenced in the Complaint and which should not be considered by the Court, or in the alternative, treat the Defendant PUC's Motion as a Motion for Summary Judgment:

- Exhibit 3, Order Amending Site Permit (May 10, 2019), Freeborn docket, MPUC docket IP-6946/WS-17-410.
- Exhibit 5, Order Accepting Applications, Establishing Procedural Framework, Varying Rules, and Notice of And Order for Hearing (January 30, 2020), Plum Creek docket, MPUC Docket IP-6997/WS-18-700.
- Exhibit 6, First Prehearing Order, (July 23, 2020), Plum Creek docket, MPUC Docket IP-6997/WS-18-700.
- Exhibit 7, Order Accepting Applications, Establishing Procedural Framework, and Varying Rules, (November 12, 2019), Buffalo Ridge docket, MPUC Docket IP-7006/WS-19-394.
- Exhibit 8, Order Accepting Application, Establishing Procedural Framework, and Varying Rules, (December 23, 2019), Three Waters docket, MPUC Docket IP-7002/WS-19-576.
- Exhibit 9, Revised Scheduling Order, (June 10, 2020), Buffalo Ridge docket, MPUC Docket IP-7006/WS-19-394.

- Exhibit 10, Second Continuance Order, (July 23, 2020), Three Waters docket, MPUC Docket IP-7002/WS-19-576.
- Exhibit 13, Comments of the MCEA, (August 24, 2018), LWECS Rulemaking docket, MPUC Docket E-999/R-18-518.
- Exhibit 15, AFCL Initial Brief (March 20, 2018), Freeborn docket, MPUC docket IP-6946/WS-17-410.
- Exhibit 17, Relator's Statement of the Case (July 10, 2020), A20-0947 (Minn. App.).
- Exhibit 18, AFCL's Exceptions to ALJ Report (June 8, 2018), Freeborn docket, MPUC Docket IP-6946/WS-17-410.
- Exhibit 19, Petition for Reconsideration (January 8, 2019), Freeborn docket, MPUC Docket IP-6946/WS-17-410.
- Exhibit 20, Motion of AFCL for Appointment of an Advisory Task Force and A Science Advisory Task Force (September 20, 2017), Freeborn docket, MPUC Docket IP- 6946/WS-17-410.
- Exhibit 21, Order Denying Petition for Advisory Task Forces (December 22, 2017), Freeborn docket, MPUC Docket IP-6946/WS-17-410.
- Exhibit 22, Relator's Statement of the Case (July 30, 2019), A19-1195, (Minn. App.).
- Exhibit 23, Order Granting Intervention to Association of Freeborn County Landowners, (September 12, 2017), Freeborn docket, MPUC Docket IP-6946/WS-17-410.
- Exhibit 24, Transcript Indexes of Evidentiary Hearings, Freeborn docket, MPUC Docket IP-6946/WS-17-410.
- Exhibit 25, a true and correct copy of this unpublished Minnesota Court of Appeals opinion *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pub. Utilities Comm'n*, No. A10-812, 2010 WL 5071389, at *1 (Minn. Ct. App. Dec.14, 2010).
- Exhibit 26, a true and correct copy of this unpublished Minnesota Court of Appeals opinion *State ex rel. Rice Cty. Land Use Accountability, Inc. v. Rice Cty.*, No. A06-1041, 2007 WL 1470417, at *1 (Minn. App. May 22, 2007).
- Exhibit 28, Reply of AFCL to Freeborn's Response to Motion for Certification to PUC for Appointment of an Advisory Taskforce and Science Advisory Task Force (October 4, 2017), Freeborn docket, MPUC Docket IP-6946/WS-17-410.

PUC Motion to Dismiss Memorandum, Affidavit and Exhibits.

Similarly, NSP/Plum Creek also attached many exhibits to its Motion and "Declaration," and AFCL requests that the following exhibits **not** referenced in the AFCL Complaint, not be considered by the Court, or in the alternative, the court should also treat the Defendant NSP's Motion as a Motion for Summary Judgment:

Page 1 of "Declaration" of Huyser, NSP/Plum Creek:

- Exhibit 1 - Application Guidance for Siting Permitting of Large Wind Energy Conversion Systems in Minnesota (Rev. July 2019), available at https://mn.gov/eera/web/doc/13655/.

Page 2 of "Declaration" of Huyser, NSP/Plum Creek:

- Exhibit 4 - *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*, AFCL's Initial Brief (March 20, 2018) (eDocket No. 20183-141225-02), PUC Docket No. IP-6946/WS-17-410.
- Exhibit 5 - *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*, AFCL Exceptions to ALJ (June 8, 2018) (eDocket No. 20186-143686-01), PUC Docket No. IP-6946/WS-17-410.
- Exhibit 7 - *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*, AFCL Petition for Reconsideration (January 9, 2019) (eDocket No. 20191-148990-01), PUC Docket No. IP-6946/WS-17-410.

Page 3 of "Declaration" of Huyser, NSP/Plum Creek:

- Exhibit 9 - Minnesota Court of Appeals' Aug. 27, 2019 Order, *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*, Case No. A19-1195 (Minn. App. 2019).
- Appendix A to Initial Filing: Agency Correspondence (June 15, 2017) (eDocket No. 20176-132804-03) ("Appendix A to Freeborn Wind's Site Permit Application").
- Appendix C to Initial Filing: Shadow Flicker Assessment (June 15, 2017) (eDocket No. 20176-132804-05) ("Appendix C to Freeborn Wind's Site Permit Application").
- Appendix D to Initial Filing: Telecommunication Reports, (June 15, 2017) (eDocket No. 20176-132804-06) ("Appendix D to Freeborn Wind's Site Permit Application").
- Appendix E to Initial Filing: Market Impact Analysis, (June 15, 2017) (eDocket No. 20176-132804-07) ("Appendix E to Freeborn Wind's Site Permit Application").

Page 4 of "Declaration of Huyser, NSP/Plum Creek:

- Appendix F to Initial Filing: Tier 3 Wildlife Studies (June 15, 2017) (eDocket No.20176-132804-08) ("Appendix F to Freeborn Wind's Site Permit Application").
- Appendix G to Initial Filing: Tier 1 and 2 Studies, (June 15, 2017) (eDocket No. 20176-132804-09) ("Appendix G to Freeborn Wind's Site Permit Application").
- Appendix H to Initial Filing: Draft Avian and Bat Protection Plan, (June 15, 2017) (eDocket No. 20176-132804-10) ("Appendix H to Freeborn Wind's Site Permit Application").
- AFCL Comments—and Petition for Contested Case and Referral to OAH (July 6, 2017) (eDocket No. 20177-133591-01).
- AFCL Comments (July 13, 2017) (eDocket No. 20177-133859-01).

- AFCL Comments to Commerce for Draft Site Permit (Oct. 9, 2017) (eDocket No. 201710-136301-01).
- AFCL Initial Brief (March 20, 2018) (eDocket No. 20183-141225-02).
- AFCL Reply Brief (April 4, 2018) (eDocket No. 20184-141687-01).
- AFCL Proposed Findings of Fact, Conclusions of Law and Recommendations (April 4, 2018) (eDocket No. 20184-141689-01).
- AFCL Exceptions to ALJ (June 8, 2018) (eDocket No. 20186-143686-01).
- AFCL Petition for Reconsideration (January 9, 2019) (eDocket No. 20191-148990-01).
- AFCL Comments (March 12, 2019) (eDocket No. 20193-151035-01).
- AFCL Petition and Motion for a Contested Case (Dec. 12, 2019) (eDocket No. 201912-158263-01).
- AFCL Motion to Remand to ALJ (Feb. 13, 2019) (eDocket No. 20192-150272-01).
- AFCL Reconsideration - Petition (May 30, 2019) (eDocket No. 20195-153253-01).

Page 5 of Declaration of Huyser, NSP/Plum Creek:

- AFCL Testimony and Exhibits (December 22, 2017) (eDocket No. 201712-138411-01).
- Testimony – Dorenne Hansen for AFCL (eDocket No. 201712-138411-02).
- Testimony – Direct Testimony – Exhibits – AFCL – 2 (eDocket No. 201712-138411-03).
- Testimony – Direct Testimony Exhibits – AFCL 3-4 (eDocket No. 201712-138411-04).
- Testimony – Direct Testimony – Exhibit AFCL 6 (eDocket No. 201712-138411-05).
- Testimony – Direct Testimony – Exhibit AFCL 7-10 (eDocket No. 201712-138411-06)
- Testimony – Direct Testimony – Exhibit AFCL 11 (eDocket No. 201712-138411-07)
- Testimony – Direct Testimony – Exhibit AFCL 12-14 (eDocket No. 201712-138411-08).
- Letter – AFCL Hansen Rebuttal and Certificate (January 22, 2018) (eDocket No. 20181-139215-01).
- MPUC Order Granting Site Permit (December 19, 2018) (eDocket No. 201812-148595-01).
- MPUC Order Amending Site Permit (May 10, 2019) (eDocket No. 20195-152849-01).
- NSP Notice of Acquisition and Request for Transfer of Freeborn Wind LWECS and HVTL (June 18, 2019) (eDocket No. 20196-153672-02).
- AFCL Comments on Xcel Permit Amendment (Nov. 12, 2019) (eDocket No. 201911-157473-01).
- DOC EERA – Comments and Recommendations (Nov. 12, 2019) (eDocket No. 201911-157474-01).

Page 6 of Declaration of Huyser, NSP/Plum Creek

- Plum Creek Wind Farm, LLC Initial Filing (Nov. 14, 2019) (eDocket No. 201911-157556-02)
- Plum Creek Wind Farm, LLC Site Permit Application Filing Letter (Nov. 12, 2019) (eDocket No. 201911-157475-01).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Figures Part 1 (Nov. 12, 2019) (eDocket No. 201911-157475-02).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Figures Part 23 (Nov. 12, 2019) (eDocket No. 201911-157475-03).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Appendix A: Agency Correspondence (Nov. 12, 2019) (eDocket No. 201911-157475-04).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Appendix C: Shadow Flicker Assessment (Nov. 12, 2019) (eDocket No. 201911-157475-07).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Appendix D: Telecom Studies (Nov. 12, 2019) (eDocket No. 201911-157475-08).
- Plum Creek Wind Farm, LLC Initial Filing – Initial Filing 2019-11-12 Site Permit Appendix E: Public Cultural Resources Literature Review (Nov. 12, 2019) (eDocket No. 201911-157475-09).
- Plum Creek Wind Farm, LLC Initial Filing – Site Permit Appendices F-H (Nov. 12, 2019) (eDocket No. 201911-157477-01).

Page 7 of Declaration of Huyser, NSP/Plum Creek

- Overland Letter Re Trade Secret Designation of Public Information (Dec. 16, 2019) (eDocket No. 201912-158326-02).
- Notice of Public Information and Environmental Impact Scoping Meeting (March 9, 2020) (eDocket No. 20203-161061-02).
- Notice of Comment Period on Petition for Rulemaking to Amend Minnesota Rules Chapter 7854 on Siting Large Wind Energy Systems (August 2, 2018) (eDocket No. 20188-145500-01).
- DOC-EERA Comments and Recommendations (Aug. 24, 2018) (eDocket No. 20188-145984-01).
- Minnesota Center for Environmental Advocacy Comments (Aug. 24, 2018) (eDocket No. 20188-145968-01).
- MPUC Order Denying Petition (Sept. 26, 2018) (eDocket No. 20189-146644-01).

In the alternative, if the Court does consider these matters outside the pleadings, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56, and AFCL requests the opportunity to present its own pertinent materials. Minn. R. 12.03. *N. States Power Co. v. Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004); *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995).

These documents are public and are assuredly relevant to this case and should be included

if/as this case moves forward, but inclusion of these massive information submissions encumbers and confuses the record and should not to be considered as a part of Defendants' Motions to Dismiss.

V. THE DEFENDANTS MOTIONS TO DISMISS SHOULD BE DENIED.

Association of Freeborn County Landowners has met its burden under MERA for a civil action against the state. Minn. Stat. §116B.10. AFCL respectfully requests that the Motions to Dismiss of Defendants Public Utilities Commission, Northern States Power and Plum Creek Wind, and Buffalo Ridge Wind and Three Waters Wind be denied, and that such other relief as the Court deems just, equitable, and proper be granted.

August 17, 2020

Carol A. Overland #254617
Attorney for AFCL
Legalectric
1110 West Avenue
Red Wing, MN 55066
(612) 227-8638
overland@legalectric.org

ACKNOWLEDGEMENT

The Plaintiff, Association of Freeborn County Landowners, by its undersigned attorney, hereby acknowledges that, pursuant to Minn. Stat. §549.211, Subd. 1. that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith, asserted a frivolous claim or defense, asserted an unfounded position solely to delay or harass, or committed a fraud upon the court.

August 17, 2020

Carol A. Overland #254617
Attorney for AFCL
Legalectric
1110 West Avenue
Red Wing, MN 55066
(612) 227-8638
overland@legalectric.org