

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
**600 North Robert Street**  
**St. Paul, MN 55101**  
**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
**121 Seventh Place East Suite 350**  
**St. Paul, MN 55101**

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

MPUC Docket No. IP-6984/CN-17-676  
MPUC Docket No. IP-6984/WS-17-749  
OAH Docket No. 60-2500-35035

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

---

**Lake Cochrane Improvement Association**  
**Exceptions and Alternative Motion**

---

Lake Cochrane Improvement Association (LCIA) offers the following exceptions and Motion in the Alternative.

1. LCIA is willing to accept the findings and recommendation of the Administrative Law Judge, provided that the Commission adopts the ALJ's decision to remove the listed towers and limit any replacement towers to the three-mile limit as described.
2. In the event that the Commission does not accept the ALJ's recommendations, then in the alternative we move the Commission as follows:

3. To consider the proposed findings and conclusions attached hereto as Exhibit A as exceptions to the ALJ's recommended findings.
4. To reverse the ALJ's rejection of LCIA's petition for contested case and petition to intervene as a party. In support of this motion, LCIA offers it's the attached motions and argument as Exhibits B and C.

### **(1) Summary of LCIA Position**

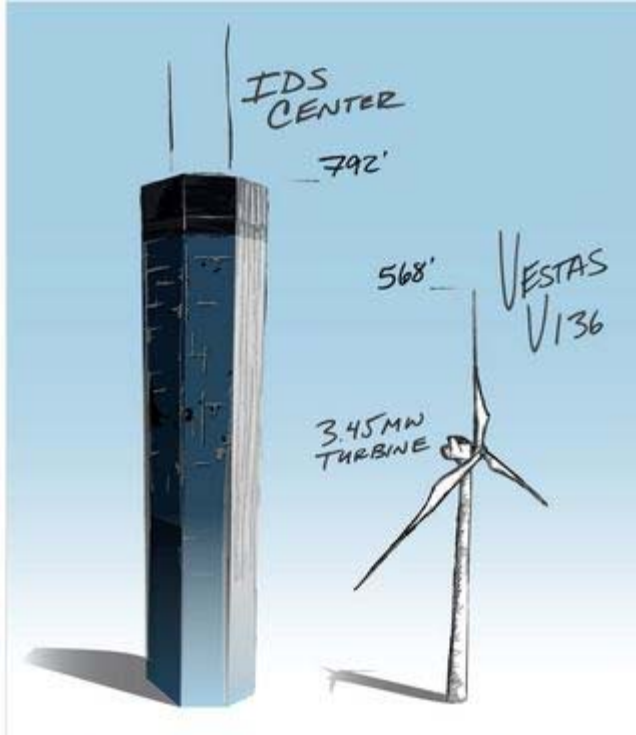
LCIA has sought to take a responsible position that facilitates development of wind energy while preserving Lake Cochrane as an important resource for this region of Minnesota. LCIA supports adoption of the findings of the ALJ, and if the findings are adopted, LCIA waives its contention that the Commission should reverse the ALJ's denial of a contested case. If the Commission does not accept the ALJ's recommendation to remove specified towers, then LCIA moves the Commission to reverse the ALJ's denial of the LCIA's request for intervention and a contested case.

### **(2) The ALJ's Recommendation Promotes Clean Energy While Protecting Lake Cochrane and its Neighbors**

The responsible zoning authority for Lake Cochrane, Deuel County, conducted hearings and carefully studied evidence and determined that a three-mile limit was required to preserve Lake Cochran's important amenities. The County's decision struck a fair balance between wind development and preservation of the natural environment. The ALJ's decision strikes a similar balance. Affirming the ALJ's decision will not harm the clean energy industry. On the contrary, it will further and foster the industry by

sending a message that Minnesota can find a way to promote clean energy while preserving communities. The DOC's position in this case, if adopted, will make it harder to promote wind energy by sending the message that clean energy demands the right to develop over the rights of communities.

In LCIA's motion for contested case, LCIA urged that there was a factual dispute regarding the visual impact of these huge turbines on Lake Cochrane. At that time, applicant and DOC urged the ALJ to deny that motion asserting that the issues presented needed no evidentiary trial that a contested case provides. Now that the ALJ has decided the case in a manner that does not square 100 percent with DOC's position, DOC suddenly announces that the case actually hinges on contested issues of fact. It argues that the picture submitted by applicant is a better rendition of what Lake Cochrane residents will see, and essentially suggests that LCIA's photograph would benefit from cross examination on foundation. If the Commission were to adopt DOC's approach, the Commission must also reverse the denial of contested case and remand for an evidentiary trial. DOC cannot dispute the ALJ's factual findings on credibility grounds, when it loses, but then turn around and claim that there should be no contested case, because there is no factual dispute.



The new wind turbines may reach 568 feet in height. *William Lager | MPR News*

It has always been clear that these towers are imposing presences on the landscape. After the ALJ's findings public radio presented its own digital representation of these towers. That rendition is to the left.



The picture on the left is a smaller version of a digital representation provided by LCIA. It was prepared by professionals who specialize in digital representations of this kind. Notice that the picture's scale is verified by the presence of a much smaller actual tower of known height and distance from the Lake.

The ALJ was presented with compelling evidence that these towers are stark and unusual features on the landscape. Throughout the proceedings DOC has suggested that this is mere agricultural open space that will be unaffected by towers of this magnitude. That position defies common sense. Lake Cochrane attracts visitors and summer residents precisely because it is an escape from an urbanized environment.

In our presentations to the ALJ, which are attached, LCIA:

- Pointed the ALJ to a high quality careful unbiased study of the impact of wind towers on the landscape that warns that photographs tend to underestimate the negative impact on view.
- Provided a professionally prepared digital simulation of the impact of the close in turbines on the Lake Cochrane area.
- Presented the Deuel County ordinance, which is the product of careful study and extensive hearings resulting in a regulatory finding that a three-mile setback is needed to protect the unique amenities that this lake provides.
- Proposed a solution that will allow the applicant to meet its objectives with only a modest alternative configuration.

The Minnesota legislature delegated municipal planning and zoning powers to the Commission insofar as a large wind energy project impacts an area like the Lake Cochrane area. The Department of Commerce seems wrongly to believe that

the purpose of this delegation was to eviscerate any consideration of local land use considerations. With respect, that was not the purpose of that delegation. There was a concern that local government might unfairly or unreasonably attempt to exclude any consideration of wind or solar power and by so doing, make it impossible to locate these facilities anywhere. But the legislature granted to the commission the responsibility of assuring that wind and solar institutions would not unduly harm communities.

LCIA is seeking to protect a regional amenity. Lake Cochrane is a scarce regional amenity. It is deserving of protection, and the ALJ's decision achieves a fair balance, a balance that DOC might have achieved if it had considered its role to protect both community and clean energy.

Dated: September 17, 2018

RINKE NOONAN

/s/ Gerald W. VonKorff  
Gerald W. Von Korff, #113232  
Suite 300 US Bank Plaza Building  
1015 W. St. Germain St.  
P.O. Box 1497  
St. Cloud, MN 56302-1497  
(320) 251-6700  
(320) 656-3500 fax  
Email: Jvonkorff@RinkeNoonan.com

***Attorneys for Lake Cochrane  
Improvement Association (LCIA)***

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
**600 North Robert Street**  
**St. Paul, MN 55101**  
**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
**121 Seventh Place East Suite 350**  
**St. Paul, MN 55101**

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;      MPUC Docket No. IP-6984/CN-17-676  
MPUC Docket No. IP-6984/WS-17-749  
OAH Docket No. 60-2500-35035

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

---

**Lake Cochrane Improvement Association**  
**Proposed Findings**

---

**INTRODUCTION**

Lake Cochrane Improvement Association (LCIA) proposes the following modification to the proposed findings submitted by applicant. LCIA believes that this wind project is the right project proposed for the wrong location. Throughout the Environmental Report, this project is treated as being placed in an agricultural area, when in fact, these turbines are located next to a precious natural resource which serves both Minnesota and South Dakota. This region is characterized by shallow, often impaired waters. Lake Cochrane is one of the prime water resources, and it is a resource for the both states.

Despite this fact, the word “Cochrane” appears only twice in the Environmental Report. Inspection of that document will show that the true impact of this project has been largely ignored by the ER, because the ER defines the “project” as the physical footprint of the particularized tower locations. The ER has largely analyzed the impacts of the project on the narrow locations on which the towers are placed, but at issue here is the impacts of this project on economy and ecology of the region.

Pages and pages of the ER are devoted to the impact on crops and cropland, on bats, eagles, wetlands located physically on the project, insects, on grassland, wildlife and migration of wildlife, the land cover types of the land on which towers are physically located, native plant and prairie communities, and rare and unique plant communities. The human environment is described as agricultural. A section on view impact is completely generic, describing the theoretical impacts of these projects on view, but failing utterly to address the issues as it

pertains to the impact on what is actually present at this particular location: a central recreational and regional tourism hub.

These proposed findings contain LCIA's justification for removal of towers A2, T35, T1, T2, T3, T5, T6, and T36. While the organization believes that the location of towers in this area is ill considered, these proposed findings represent site conditions that would dramatically mitigate the harm to the region.

These proposed findings are responsive to the proposed findings submitted by applicant: and are cross referenced to the paragraph numbers on that submission.

### **PROCEDURAL SUMMARY**

1. Add to paragraph 28: Flying Cow Wind also opposed the motion for contested case as to the Site Permit on the grounds that it was premature.
2. Add after paragraph 30: Lake Cochrane Improvement Association (LCIA) was formed to encourage all persons owning property around the lake to maintain their premises in a clean, orderly and decent appearance; to take all such action as is necessary to preserve and improve the condition of the water in the lake; to take all such steps as are necessary to prevent the pollution of the lake; to encourage the development of the area around the lake in such a way as to make it an attractive and desirable environment for the enjoyment of the great outdoors; and to assure the continuation of Lake Cochrane and its environs for the benefit of future generations.

### **SITE DESCRIPTION**

At the end of the Site Description Findings, add

3. There are 208 cabins and homes on the Lake and 35% of them are owned by families who claim Minnesota as their primary residence. There are over 100 families who claim the Lake as their primary residence and many of those are here year-round. The population during the week is about 250 and it grows to nearly 1,500 on weekends.
4. Other than West Lake Okoboji, there is no Midwest lake south of Lake Cochrane with comparable water and quality of life. In that respect, Lake Cochrane is truly a regional lake with property owners from South Dakota, Minnesota, Iowa and Nebraska. Much of South Western Minnesota's prairie has been converted to agricultural uses (78% is cropland), while wetlands have been drained and the installation of artificial drainage has increased. This has caused high nutrient and sediment levels in the region's naturally shallow lakes<sup>1</sup>.

---

<sup>1</sup> <https://www.pca.state.mn.us/water/state-lakes>



5. The South Dakota Department of Game, Fish, and Parks operates the Lake Cochrane Recreation Area on the north shore of Lake Cochrane. It offers camping (30 electric sites), cabin lodging, picnic facilities, a playground and a swimming beach. There are four classifications of campgrounds in South Dakota. Lake Cochrane is a Prime which is the top rating because of its facility offerings and high occupancy rating. In 2017 the park hosted over 13,000 visitors and 1988 overnight camping units. Lake Cochrane and its surroundings represent a unique and important resource for the region.

#### IV. SITE LOCATION AND CHARACTERISTICS

6. Add to Site Location and Characteristics: Lake Cochrane is part of the Lazurus sub watershed of the Lac qui Parle-Yellow Bank Watershed, which in Minnesota is governed by the watershed district of the same name. The sub watershed spans South Dakota and Minnesota. See Attachment A. The lakes, ponds, streams, ditches and wetlands in the Lac qui Parle-Yellow Bank watershed are important community assets, supplying recreational and aesthetic benefits, wildlife habitat, and fishery resources as well as provide for a strong economic growth for the local residents. (See Watershed Plan, p vii.) Almost half of the watershed lies in South Dakota.
7. Lake Cochrane is a regional asset that integrates into the regional economy and the regional environmental ecosystem. Each state has a responsibility to adjoining states to assure that developments do not infringe on the neighboring state's environment. *See North Dakota v. State of Minnesota*, 263 U.S. 365 (1923). *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (fumes migrating across the border from copper smelting); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Tarrant Regional Water Dist. v. Herrmann*, 133 S.Ct. 2120 (2013).
8. Add to Paragraph 15. However, Applicant has not applied the South Dakota setback requirements to the Minnesota side of Lake Cochrane.
9. Substitute Paragraph 16 as follows. Yellow Medicine County is located in an area of Minnesota that is predominately agricultural area. However, the project itself borders on an area of Minnesota and South Dakota that is a regional hub for recreational uses, lake homes, and water resources. Counting only the physical space occupied by the project, the land is 46.5% cropland and 26.2% pasture/grassland.<sup>90</sup> Approximately 82.19 acres (0.36% of the Project Area) will be permanently converted to non-agricultural land use. However, those proportions overlook the important uses for which Lake Cochrane is the central hub.
10. The zoning authority for Lake Cochrane is Duel County South Dakota. As a result of extensive study, the County established a three-mile setback for towers. While Duel County does not have zoning authority over the proposed tower locations, the PUC, which has been granted corresponding land use regulatory authority should afford deference to the Duel County's study and determination. The vast majority of towers proposed by the applicant are outside of the three-mile limit, if applied to Minnesota. Several towers in particular are located so as be of concern. They are A2, T35, T2, T3,

T5, T6, T36. The Duel County zoning setback reflects the level of protection necessary to provide adequate protection compatible with environmental preservation, sustainable development, and the efficient use of resources.

11. Applicant has indicated in various filings that the exact number and configuration is in flux.

### **Factors for a Site Permit**

Add the following after Paragraph 86

12. Minnesota Statutes section 116D.04 subdivision 6 requires the PUC to avoid permitting of projects that cause or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state. The application and siting, if approved would significantly affect the quality of the environment; it would permit a project that damages natural resources management and development. Minn. Stat § 116D.04 subdivision 6. Approval of the project as configured would cause or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state.
13. A critical aspect of this project is its impact on the human environment. Lake Cochrane and its surroundings are important asset to the surrounding communities in both Minnesota and South Dakota. It attracts tourism to both states; it provides summer residents to the families from both states; it supports an attractive regional recreational asset to both states. It is feasible to make revisions in the location of towers, or eliminate the closest towers, and dramatically reduce the negative impacts of this project.
14. Remove Paragraph 90.

### **Land-Based Economies**

15. Add to Paragraph 91. The Environmental Report accurately describes the physical footprint of the project as predominantly agricultural. However, there are significant environmental impacts of the project, not adequately described in the environmental report on the non-agricultural economy and human settlement.
16. Remove paragraph 97.

### **Land Use**

17. Remove paragraphs 99, 100.
18. There is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Alternatives would include relocating towers away from the Lake Cochrane

area entirely, or implementing a setback requirement, and imposing suitable conditions to protect the environment. Elimination of Towers A2, T35, T1, T2, T3, T5, T6, T36, will significantly reduce the negative impacts, without compromising the feasibility of the project. By so doing, the same land use restrictions will be observed on both sides of the lake.

### **Local Economies**

19. Add to paragraph 103: With the elimination of towers A2, T35, T1, T2, T3, T5, T6, T36.....
20. Remove paragraphs 105 and 108; replace with the following<sup>2</sup>. Applicant has provided a generic study purporting to support the contention that land values will not be negatively impacted<sup>3</sup>. That study has been subject to significant criticism. See for example, WIND FARMS, RESIDENTIAL PROPERTY VALUES, AND RUBBER RULERS Albert R. Wilson<sup>4</sup>; McCann, Regarding Ben Hoen study on residential property values<sup>5</sup>. The Hoen study is a statistical mass appraisal presentation that does not consider individual circumstances. The zoning authority most closely associated with the particular circumstances has concluded that a 3-mile setback is appropriate.

### **Visual Impacts**

21. Add to paragraph 115. The visual impact in the lake Cochrane area would significantly detract from the areas functionality as a recreational, summer home and tourism hub. That visual impact can be significantly reduced by removing towers A2, T35, T1, T2, T3, T5, T6, and T36.

### **Surface Water and Floodplain Resources**

22. Add to paragraph 159, Provided however, removal of towers A2, T35, T1, T2, T3, T5, T6, and T36 will significantly reduce impacts to human settlement.

### **Site Permit Conditions**

23. Add the following. towers A2, T35, T1, T2, T3, T5, T6, and T36 shall be eliminated from the project, and any towers substituted or added must be located outside the three mile setback

### **Conclusions of Law**

---

<sup>2</sup> See <https://www.wind-watch.org/documents/category/property-values/?titles=on>

<sup>3</sup> The author is not an appraiser, nor is he an engineer, as suggested on his resume. He would not be qualified in Minnesota to give an opinion of value. <https://eta.lbl.gov/people/ben-hoen>

<sup>4</sup> <https://docs.wind-watch.org/WindFarmsResidentialPropertyValuesandRubberRulers.pdf>

<sup>5</sup> <https://www.wind-watch.org/documents/regarding-ben-hoen-study-on-residential-property-values/>

24. Add. The environmental report failed adequately to address the impacts on human settlement.

Dated: August 6, 2018

Ron Ruud

*/s Ron Ruud*

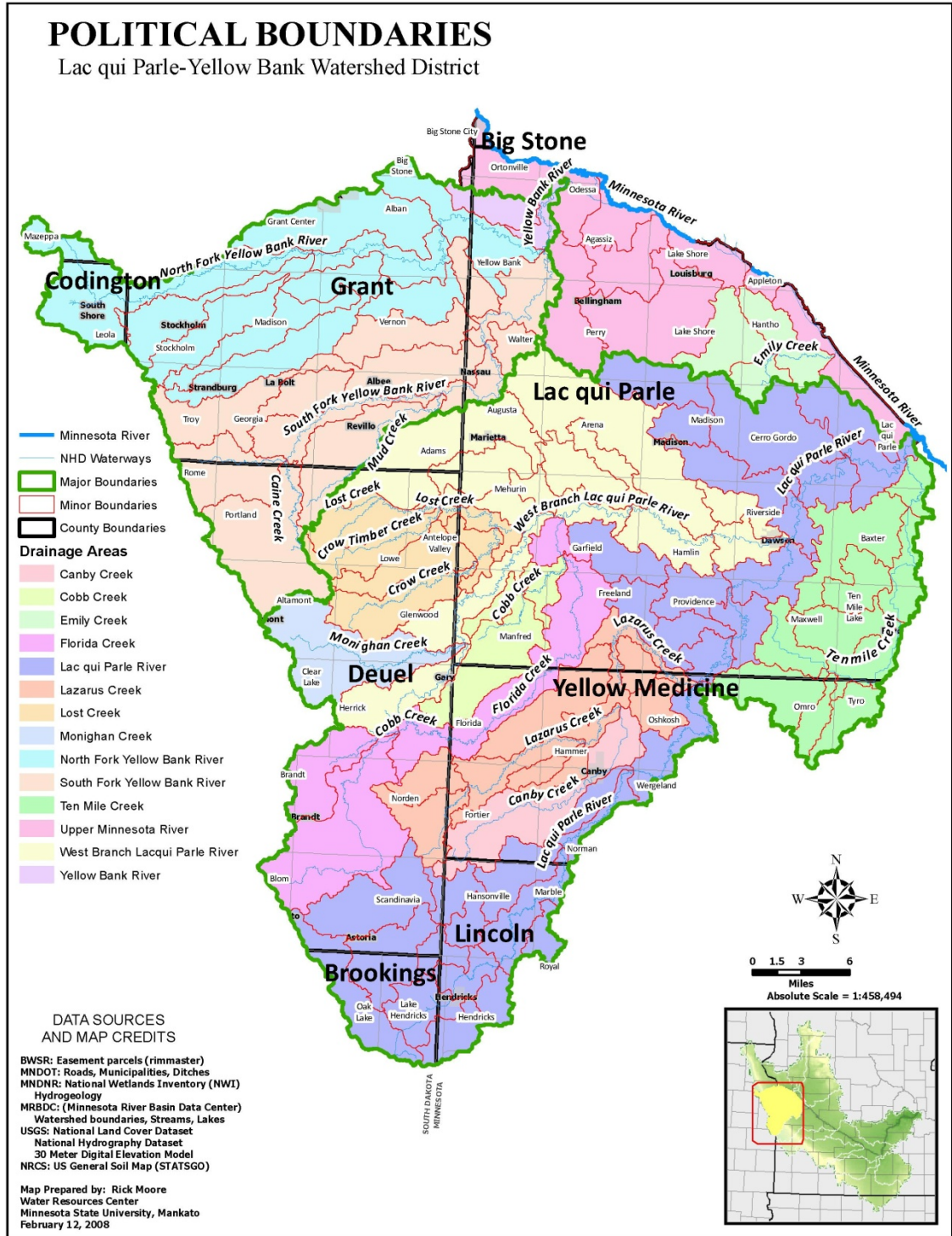
---

On behalf of LAKE COCHRANE  
IMPROVEMENT ASSOCIATION

Ron Ruud  
3270 Edgewater Drive  
Gary SD 57237  
Email: ronor52@gmail.com

# Lac qui Parle – Yellow Bank Watershed District

Watershed District



2009 through 2019

Prepared by Lac qui Parle – Yellow Bank Watershed District and Bayerl Water Resources

EXHIBIT A

## **Executive Summary:**

Ecosystems and water resources are managed to sustain their long-term health and integrity to enhance the well-being of the citizens within the Lac qui Parle-Yellow Bank watershed. Through the identification of water quality and quantity issues in the watersheds, the Lac qui Parle-Yellow Bank Watershed District developed goals to guide their water resources management activities. Management strategies and policies for each goal were developed based on the District's goals for resolving watershed issues and a review of existing programs. Water management strategies and District policies become the management framework for the Lac qui Parle-Yellow Bank Watershed District's 10-year master plan to achieve its goals. The Plan was developed to both continue and expand existing activities and to establish new activities. A holistic watershed management plan is needed to protect the people, water quality and the economic welfare of this District. The overall goal of the Board is to make the wisest water management decision possible for the water resources within the District. This revised overall plan is intended to be the guide for the accomplishment of this goal.

The lakes, ponds, streams, ditches and wetlands in the Lac qui Parle-Yellow Bank Watershed District are important community assets, supplying recreational and aesthetic benefits, wildlife habitat, and fishery resources as well as provide for a strong economic growth for the local residents. However, maintaining good water quality in these water resources is a challenge, particularly considering the intensive agricultural industry which makes up the vast majority of the Lac qui Parle-Yellow Bank watershed. Water quality is closely linked to land use and conditions in the surrounding watershed. Storm water runoff can carry significant amounts of sediment and phosphorus from the watershed into these water bodies, along with other pollutants.

This Third Generation Plan will prioritize water resources and develop management plans for those resources by priority or as opportunity provides. This plan includes goals for maintaining or improving water quality and quantity management based on practical use, funding and implementation strategies.



## Sub-Watershed #4 – Lazarus Creek

**Figure Eight G**

The Lazarus Creek Watershed is north of Canby Creek, and also flows northeast. There are many unnamed creeks and waterways that drain into Lazarus Creek. About 16,000 acres of the watershed are in South Dakota, including the area around Fox Lake and Lake Cochrane in Deuel County. There are about 20,500 acres of the sub-watershed in Minnesota, all of which are in Yellow Medicine County. The Canby Creek Watershed adjoins the main channel of the Lac qui Parle Watershed on the north. Major land use is cultivated crops.

**Area:** 85,622 Acres

### Minor Sub-Watersheds:

- 24005 ( 6,990 acres)
- 24006 ( 3,870 acres)
- 24007 (14,371 acres)
- 24011 ( 5,895 acres)
- 24012 ( 8,603 acres)
- 24013 ( 8,598 acres)
- 24014 ( 2,844 acres)
- 24015 ( 6,306 acres)
- 24016 (23,034 acres)
- 24017 ( 5,110 acres)

**Surface Waters:** Del Clark Lake – impoundment, Culver Lake, Lake Sylvan, Bohemian Lake, Victor’s Slough and 12 unnamed public waters in Minnesota and Lakes Oliver, Cochrane and Cottonwood Slough in South Dakota.

Miles of stream: **70.8**

Canby Creek: **23.9**

Lazarus Creek: **46.9**

### Local Government:

Counties: Lac qui Parle, Yellow Medicine, Lincoln  
Townships: Freeland, Florida, Hammer, Fortier, Norman, Hansonville  
Cities: Canby

Lazarus Creek Easements	
Acres enrolled in CRP	7396.06
Acres enrolled in RIM	782.37
WPA acres	181.05
WMA acres	1369.53
Number of WMA easements	5

Land Use Within the Lazarus Creek Sub-Watershed			
Land Use Classification		Acres	Percent
11	Open Water	1854.97	2.17
21	Developed, Open Space	3908.24	4.57
22	Developed, Low Intensity	371.05	0.43
23	Developed, Medium Intensity	131.87	0.15
24	Developed, High Intensity	49.29	0.06
31	Barren Land (Rocks, Clay, Sand)	59.6	0.07
41	Deciduous Forest	717.66	0.84
42	Evergreen Forest	0	0.00
52	Shrub/Scrub	0	0.00
71	Grassland/Herbaceous	9021.66	10.54
81	Pasture/Hay	10226.24	11.94
82	<b>Cultivated Crops</b>	<b>54126.27</b>	<b>63.22</b>
90	Woody Wetlands	94.33	0.11
95	Emergent Herbaceous Wetlands	5051.16	5.90
	Unknown	0	0.00
<b>Total</b>		<b>85,612.34</b>	<b>100</b>

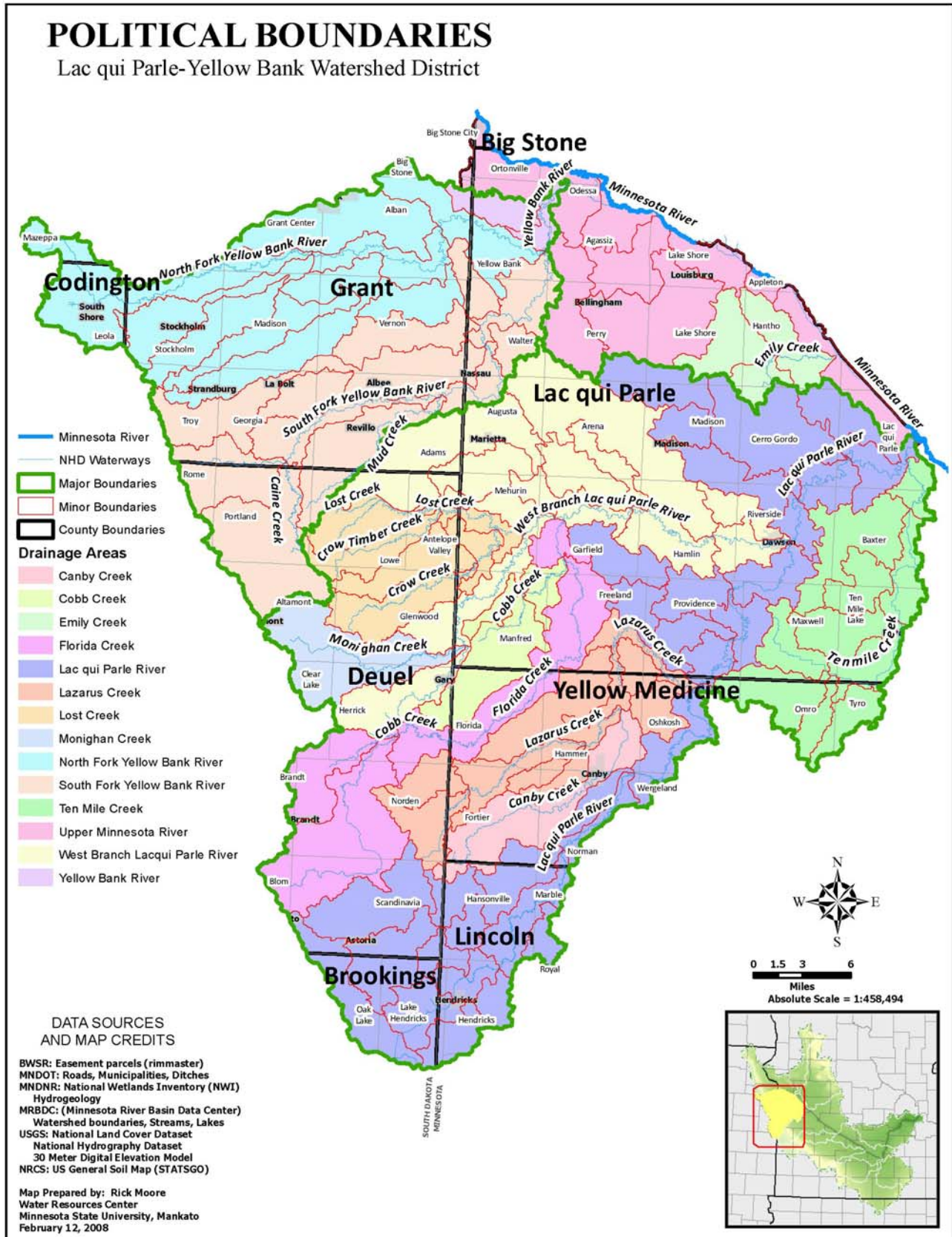
Lazarus Creek Sub-watershed Best Management Practices	
Abandoned well sealing	43
Water and sediment control basin	6
Residue management - mulch	3
Windbreak/Shelterbelt establishment	22
Erosion control	2
Terrace	25
Septic system improvement	6
Grassed waterway	9
Conservation cover easement	1
Filter strip	3
Streambank and shoreline protection	1
Drainage system modification	5

**Areas of Concern:** Lazarus Creek is impaired for Aquatic Life and Aquatic Recreation. Del Clark Lake is impaired for Aquatic Consumption.

Lakes Greater Than 10 Acres in LqP-YB Watershed				<i>Table Seven</i>
Lake Id No.	Acres	Lake Name	DNR Class	Sub-watershed
*	222.3	Fox Lake		Cobb Creek
*	202.4	Cottonwood Slough		Cobb Creek
*	150.5	Rush Lake		Crow Creek
*	171.1	Lone Tree Lake		Crow Creek
*	121.6	Lake Francis		Crow Creek
41010900	113.2	Bohemian	NE	Lazarus Creek
87011600	121.0	Victors Slough	NE	Lazarus Creek
87018000	158.1	Del Clark Lake		Lazarus Creek
*	172.1	Lake Oliver		Lazarus Creek
*	363.3	Lake Cochrane		Lazarus Creek
*	248.9	South Slough		Lazarus Creek
37018500	217.6	Unnamed	NE	Lower Lac qui Parle River
37009300	130.1	Unnamed		Minnesota River
37004600	283.2	Lac qui Parle	NE	Minnesota River
06000100	336.0	Marsh		Minnesota River
06000100	1,689.2	Marsh		Minnesota River
37004600	1,806.7	Lac qui Parle	NE	Minnesota River
37004600	1,902.8	Lac qui Parle	NE	Minnesota River
*	487.1	Punished Woman Lake		North Fork Yellow Bank River
*	159.6	Round Lake		North Fork Yellow Bank River
*	258.0	Lake Albert		North Fork Yellow Bank River
37022400	124.2	Pegg	NE	South Fork Yellow Bank River
*	1,081.4	Lake Alice		South Fork Yellow Bank River
87011400	104.6	Lanners		Ten Mile Creek
37004300	130.1	Swanson	NE	Ten Mile Creek
87010200	227.5	Miller	NE	Ten Mile Creek
41010500	172.9	Unnamed	NE	Upper Lac qui Parle River
41010800	191.8	East Twin	NE	Upper Lac qui Parle River
41010200	203.9	West Twin	NE	Upper Lac qui Parle River
41011000	658.9	<i>Lake Hendricks</i>	GD	Upper Lac qui Parle River
*	1,491.8	<i>Lake Hendricks</i>		Upper Lac qui Parle River
*	401.9	Oak Lake		Upper Lac qui Parle River
*	749.8	Fish Lake		Upper Lac qui Parle River
37010700	130.2	Unnamed	NE	West Branch Lac qui Parle River
37025100	141.7	Unnamed		West Branch Lac qui Parle River
37010300	165.1	Cory	NE	West Branch Lac qui Parle River
37014800	173.8	Unnamed	NE	West Branch Lac qui Parle River
37022900	239.8	Salt	NE	West Branch Lac qui Parle River
37020300	120.5	Mud	NE	Yellow Bank River
*Located in South Dakota			NE=Natural Environment GD=General Development	



Figure Two



**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
**600 North Robert Street**  
**St. Paul, MN 55101**  
**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
**121 Seventh Place East Suite 350**  
**St. Paul, MN 55101**

In the Matter of the Application of Flying  
Cow Wind, LLC for a Certificate of Need  
for the 152 MW Large Wind Energy  
Conversion System in Yellow Medicine  
County, Minnesota;

MPUC Docket No. IP-6984/CN-17-676  
MPUC Docket No. IP-6984/WS-17-749  
OAH Docket No. 60-2500-35035

In the Matter of the Application of Flying  
Cow Wind, LLC for a Site Permit for the  
up to 152 MW Large Wind Energy  
Conversion System in Yellow Medicine  
County, Minnesota;

---

**Lake Cochrane Improvement Association**  
**Ron Ruud Declaration**

---

Ron Ruud submits the following Declaration in support of the reply materials submitted by Lake Cochrane Improvement Association.

1. I make this declaration under the provisions of Minnesota Statutes Section I declare under penalty of perjury, pursuant to Minn. Stat. §358.116, that everything I have stated in this document is true and correct.
2. Lake Cochrane Improvement Association had concerns about the accuracy of the photographic presentations at the hearing. Consequently, leadership was tasked to find expertise in accurate photographic representation of the impact of towers.
3. We learned that the photographic representation involves application of considerable expertise. A publication *Wind Turbine Visibility and Visual Impact Threshold Distances in Western Landscapes* Robert G. Sullivan<sup>1</sup> warns that photographs significantly understate the visual impacts of towers. We've referred

---

<sup>1</sup> <http://blmwyomingvisual.anl.gov/docs/WindVITD.pdf>

to this study in our proposed findings.

4. For this reason, we retained the services of Artistic Engineering of California. Artistic Engineering is the leading provider of 3D photo simulations and related visual products/services. They are “a pioneer in the photo simulation industry, with over a decade of experience providing photo simulations for wireless telecom, residential and commercial real estate, alternative energy and industrial applications.” We learned also that a number of engineering firms have developed these techniques, because they are now regularly used to provide visual information in aid of community and regulatory understanding of the impact of projects like this.
5. We provided Artistic Engineering with accurate photographs of the view from Lake Cochrane and geometric information on the tower size and locations, providing them with the information that they required to develop an accurate representation. We asked that they provide their best accurate representation of the visual impact of the towers closest to the Lake.
6. We have a number of pictorial representations provided to us by Artistic Engineering. The representations depend to some extent on the field of view chosen. According to Artistic Engineering, the attached exhibit is a best representation of the impact.
7. The picture was taken from the deck of a Lake Cochrane resident with a Nikon Coolpix 520 with a 35mm focal length of 225mm. This provided a very narrow shot that would include several proposed turbines at varying distances from the lake to provide some visual guidance on the effects of distance. Scale wise the heights are correct.
8. The approximate distances for each tower from the east shore of Lake Cochrane are as follows; T5 2.25mi, T12 5.0mi, T6 3.00mi, T11 4.25mi, T10 4.0mi, T3 1.25mi, T36 2.25mi. As a reference point the structure to the right of T10 is a rural water pumping station that is 65 feet tall.
9. The image inserted below is the representation prepared by Artistic Engineering and represents their best representation of the view if towers are placed as proposed.

Dated: August 6, 2018

Ron Ruud

*s/Ron Ruud*

---

On behalf of LAKE COCHRANE  
IMPROVEMENT ASSOCIATION

VIEW 5

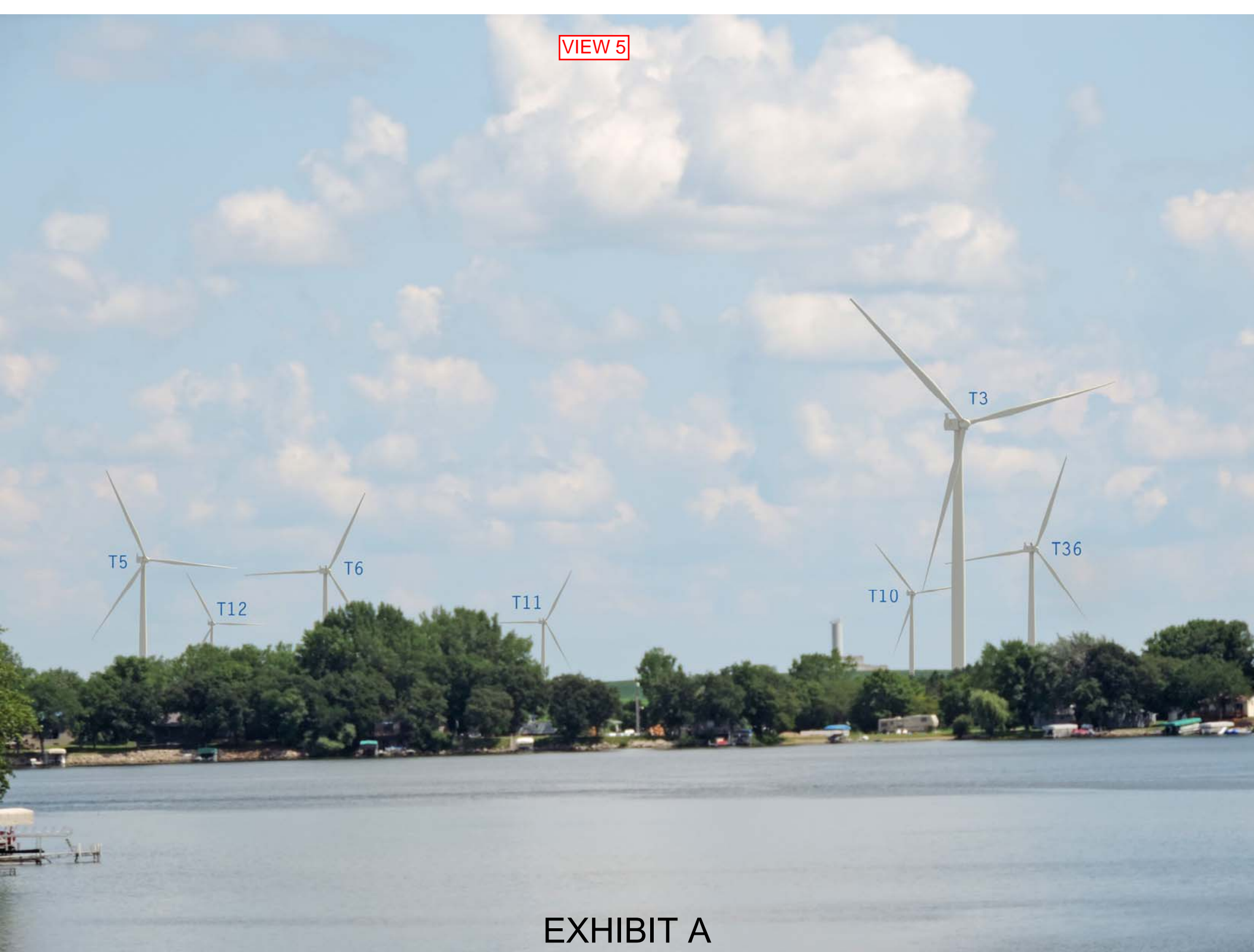


EXHIBIT A

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
**600 North Robert Street**  
**St. Paul, MN 55101**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
**121 Seventh Place East Suite 350**  
**St. Paul, MN 55101**

In the Matter of the Application of Flying Cow Wind, LLC for a Certificate of Need for the 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

MPUC Docket No. IP-6984/CN-17-676  
MPUC Docket No. IP-6984/WS-17-749  
OAH Docket No. 60-2500-35035

In the Matter of the Application of Flying Cow Wind, LLC for a Site Permit for the up to 152 MW Large Wind Energy Conversion System in Yellow Medicine County, Minnesota;

---

**Joint Motion for Certification of Request for Contested Case Hearing and Intervention to Public Utilities Commission**

---

**I. INTRODUCTION.**

The Laborers District Council of Minnesota & North Dakota (“Laborers Union”) and Lake Cochrane Improvement Association (“LCIA”) (collectively, “Petitioners”) respectfully request that the Administrative Law Judge (“ALJ”) certify Petitioners’ motions for contested case proceedings and party status for LCIA (“Motions”), and the ALJ’s related Orders denying Petitioners’ requests (“Orders”) to the Minnesota Public Utilities Commission (“Commission”) for further review. The Orders deny Petitioners’ requests for contested case proceedings in the above-referenced dockets and deny LCIA’s petition for party status in the proceedings. Petitioners respectfully request that the ALJ certify the Orders to the Commission for a

determination concerning whether the denial of the Motions and Petition for Intervention was warranted and, if not, what process should be followed going forward.

Petitioners represent stakeholders, including construction workers, residents, and businesses located in and around the location of the proposed Bitter Root Wind project, whose interests could be significantly affected by the Commission's decision to grant or deny a Certificate of Need and Site Permit. The Laborers Union, LCIA, and our members and affiliates have made substantial efforts to address concerns, obtain critical information, and resolve material factual disputes within the confines of the informal hearing process. Unfortunately, those good-faith efforts have failed to resolve critical factual matters or yield an adequate record.

Petitioners are not late arrivals to the Bitter Root proceedings, but have been raising our concerns with Applicant representatives, and Department of Commerce and Commission staff for months – years in the case of LCIA. During the process, we have been assured again and again by the Applicant and agency staff that the informal hearing process would provide ample opportunity to fully participate in the development of a robust record. In the words of the Minnesota Department of Commerce Division of Energy Resources (“DOC DER”), we were told that neither party status nor contested case hearings were needed because the informal process “generously accommodates engagement by non-parties, and provides a venue in which issues can be rigorously developed, using processes that mirror almost all of the processes available in Chapter 1400 contested case proceedings.”

Our experience has been quite different. Applicant has wielded the informal hearing process as a shield by objecting to Petitioners' full participation in the process, refusing to provide information, and generally ignoring the body of evidence that has been developed in the record by Petitioners. Applicant's refusal to provide simple and easily obtainable information on

use of local labor on the company's Minnesota wind energy projects – after implying during the hearing that such data would be made available – is just the latest example. Moreover, the rejection of LCIA's petition to intervene as of right under the Minnesota Environmental Rights Act (MERA) is unsustainable. MERA grants LCIA the right to press its environmental claims as a matter of is right, and the time limit imposed by the ALJ on that right is contrary to law. *Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006). If the Commission denies intervention it will actually delay resolution of the issues, because MERA then grants LCIA the ability to vindicate its claims in District Court.

Petitioners simply do not believe that the informal hearing process has produced the sort of robust record upon which the Commission must rely in granting a Certificate of Need and Site Permit. We respectfully request that the Commission be given the opportunity to weigh in and, if necessary, to address the issue.

## **II. PROCEDURAL HISTORY.**

On March 14, 2018, the Laborers Union filed a petition for intervention and initial request for a contested case hearing.

On March 21, 2018, Applicant filed a response arguing that the petition for a contested case hearing was untimely and unnecessary, and that formal intervention was also unnecessary based on the issues raised in the Laborers Union's petition, and considering procedural devices available through the informal hearing process.

On March 28, 2018, Petitioner filed a reply brief regarding its contested case hearing request.

On March 28, 2018, 2018, the Minnesota Department of Commerce Division of Energy Resources ("DOC DER") filed a reply brief arguing that contested case proceeding request was



untimely and also unnecessary, stating “Minn. Rules Chapter 1405, which governs the joint public hearings for these dockets, generously accommodates engagement by non-parties, and provides a venue in which issues can be rigorously developed, using processes that mirror almost all of the processes available in Chapter 1400 contested case proceedings.”

On April 6, 2018, Mr. Bret Eknes submitted a letter on behalf of Commission staff disputing assertions made by Applicant and DOC DER that the request for contested case proceeding was timely. The letter contends that the deadline to request a contested case for the certificate of need is “tied to the deadline for reply comments on the merits of the need application.”

On May 7, 2018, the ALJ issued an order granting the Laborers Union’s petition to intervene in the proceedings and denying the union’s request for a contested case hearing, indicating that the Laborers Union had “failed to demonstrate a contested case hearing is necessary to produce facts that would aid the Commission in determining whether to issue the certificate of need or the site permit.”

On June 25, 2018, the Laborers Union sent an email to the ALJ and Applicant indicating the union’s intention, subject to the ALJ’s approval, to present and question two witnesses; to question Applicant witnesses on several topics including the Applicant’s past Minnesota wind energy projects; and to “submit simple discovery requests that could be fulfilled by the applicant prior to the scheduled close of the comment period” covering relevant information that the Applicant was unable to provide during the public hearing.

On June 25, 2018, Applicant responded by email to the abovementioned correspondence objecting “to the scope of Intervenors' proposed participation”, which Applicant characterized as “in multiple ways treating the Public Hearing as if it were a formal contested case hearing, which

it is not.” Applicant specifically objected “to Intervenors conducting direct examination of its witnesses and cross-examination of FCW witnesses (of which there are none)”. Applicant also objected to any written discovery request as “far outside the scope of the Public Hearing procedure, and more in line with a contested case proceeding.”

On June 27, Ms. Sheena Denny sent an email on behalf of the ALJ citing the Applicant’s objection and “denying the Laborers Union’s requests” regarding proposed participation in the public hearing.

On June 28, 2018, the ALJ presided over an informal joint public hearing on the Site Permit Application and Certificate of Need Application in Canby, Minnesota. The Laborers Union was permitted to provide, but not to question, two witnesses, and to ask a limited number of questions of Applicant’s representatives. Applicant representative Sean Flannery was unable to provide information on use of local labor on construction of Applicant’s most recent Minnesota wind energy development (Pleasant Valley) but stated that “[w]e’ve started to ask internally how we can find that information” and acknowledged that the company should, in its capacity as general contractor for the project, have access to detailed information. Applicant representative Brian Lammers further stated that Applicant would “endeavor to track down” data on hours worked by Minnesota workers on the Pleasant Valley project.

On July 10, 2018 the Laborers Union filed written comments responding to Mr. Lammers’ statement that the company would “endeavor to track down” the requested information in which the union specified the exact information sought on the construction of both Pleasant Valley and the company’s Stoneray Wind project, which was also discussed at the hearing.

On July 18, 2018, during the public comment period that followed the release of the Draft Site Permit, LCIA filed a petition to intervene based in part on the statutory right to intervene afforded under the Minnesota Environmental Rights Act, (MERA) Minn. Stat. Section 116B.09, and a motion for a contested case hearing on the proposed Certificate of Need and Route Permit. LCIA's motion was accompanied by evidence rebutting and directly contradicting testimony submitted by applicant at the public hearing. That evidence included (a) an ordinance passed by the Deuel County government as zoning authority essentially finding that placement of turbines within 3 miles of Lake Cochrane would be harmful and should be prohibited, (b) official watershed documents showing that Lake Cochrane is part of a watershed and ecosystem spanning both states, and a section from the Watershed official plan to the same effect (c) a declaration referring to a comprehensive federal Bureau of Land Management Study on the visibility impact of wind turbines that substantially contradicts information submitted by applicant, (d) a professionally prepared visual demonstration of the visibility impact of the closest turbines that substantially contradicts the evidence submitted by applicant at the public hearing. LCIA's filings urged that it was possible dramatically to reduced the impact of the proposed project by removing the few turbines that were too close to the Lake Cochrane basin, and that MEPA and MERA, including section 116D.04 subdivision 6, required selection of that alternative.

Although it was represented during these proceedings that the public hearing process was adequate to allow project opponents to prepare and respond to applicant, in fact, both LCIA and Laborers Union found the process completely inadequate to respond and rebut evidence at submitted at the public hearing.

On July 18, 2018, during the public comment period that followed the release of the Draft Site Permit, the Laborers Union filed a second request for a contested case hearing on the proposed Certificate of Need and Route Permit. The motion was accompanied by testimony from the Executive Director of North Star Policy Institute, a letter from Ullico Investment Management Company, and other evidence refuting material facts asserted by the Applicant that are directly relevant to the legal requirements for the grant of a Certificate of Need and Route Permit for a Large Wind Energy Conversion System.

On August 2, 2018, the ALJ issued an order denying the Laborers Union's second request for a contested case hearing. The order largely restated, verbatim, the reasoning from the ALJ's May 7 order rejecting the Laborers Union's first request for a contested case hearing – including an erroneous reference to “potential safety hazards associated with construction” that were cited as a potential concern in the first request but not in the motion under consideration.

On August 6, 2018, Applicant filed Reply Comments on the merits of the project. In an about-face from the company's posture during the public hearing, Applicant objected to the Laborers Union's request for information on the employment of local workers on the company's past and current Minnesota wind projects and refused to provide the requested information.

On August 10, 2018, the ALJ issued an order vacating the August 2 order denying the Laborers Union's request for a contested case hearing and striking the order from the record.

On August 8, 2018, the ALJ issued an order denying the LCIA petition to intervene in the proceedings and denying the organization's request for a contested case hearing, concluding that “LCIA's arguments and the facts it alleged do not meet the legal threshold required for a contested case hearing and that the petition to intervene was untimely filed.” The order essentially found that since Lake Cochrane itself was not in Minnesota, there could be no adverse

environmental impact on Minnesota, even though all of the turbines are located in Minnesota. Since Lake Cochrane is not in Minnesota, the order ruled, MEPA and MERA do not apply to the project, and therefore LCIA had no MERA rights, despite the mandatory nature of section 116B.09.

On August 14, 2018, the ALJ issued an amended order denying the Laborers request for a contested case hearing, concluding that “was filed so late in the process as to raise questions as to its timeliness and the possible prejudice to Flying Cow. More importantly, LDC failed to show there were any issues of material fact requiring an evidentiary hearing to resolve that would aid the Commission in making it decision.”

### **III. LEGAL STANDARD.**

Minnesota Rule 1400.7600<sup>1</sup> sets forth the standard for certifying the Motion to the Commission and provides, in relevant part:

Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing . . . be certified by the judge to the agency. In deciding what motions should be certified, the judge shall consider the following:

A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or

B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or

C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

---

<sup>1</sup> Minn. R. 1405.2200 provides a complimentary provision allowing an administrative law judge to certify motions in route permit proceedings.

D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

E. whether it is necessary to promote the development of the full record and avoid remanding; or

F. whether the issues are solely within the expertise of the agency.

Consideration of these factors strongly supports certification to the Commission.

**IV. THE MOTION AND ORDER SHOULD BE CERTIFIED TO THE COMMISSION.<sup>2</sup>**

As explained in this section, the factors identified in Minn. R. 1400.7600 support certifying the Motion and Order to the Commission. Specifically:

**A. The motion involves controlling questions of law as to which there is substantial ground for a difference of opinion.**

LCIA has prepared a separate memorandum asserting the reasons that the order denying its petition to intervene as a party. LCIA was not represented by counsel throughout the process leading to the public hearing. LCIA heard the staff and applicant repeatedly assert that participation without intervention would afford substantially the same rights as would be afforded if it sought formal intervention. LCIA understood that there were two phases of this case, the first being certificate of need, and the second being the site permit. The thrust of LCIA's position has always been that there the permit should honor the three-mile setback, and this seems clearly a site permit issue. When Laborers Union moved for a contested case, applicant argued that this request was premature. From a layman's perspective, LCIA feels as

---

<sup>2</sup> The analysis below addresses the law and facts relevant to the determination of whether the Motion and Order should be certified to the Commission. Petitioners' substantive arguments concerning the merits of the Motion are included in its previous filings are incorporated here by reference, pending supplement if allowed or requested by the Commission.

though it has been whipsawed, perhaps inadvertently, because now it is said that its motion is too late.

LCIA fails to understand the contention that it should not be allowed to intervene. As LCIA's memorandum makes clear, MERA gives it an absolute right to intervene, and MERA does not sanction the denial of the right to intervene to protect the environment simply because the intervention comes a few weeks or even months after the agency would prefer. The Court of Appeals has made it clear that even if LCIA had entirely bypassed intervention, LCIA could bring a MERA case even after the permit is granted. Forcing the intervention to occur in the district court, instead of here before the agency, merely postpones the issue until later. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006). LCIA has met the statutory requirements for mandatory intervention. MERA and MEPA both require the PUC to observe the least feasible impact principle. LCIA has advanced a credible alternative project design that observes a significantly lesser impact, without materially impairing the project. The ER utterly failed to consider that lesser impact, even though LCIA has been urging its consideration since the beginning of this case. Postponing that controlling question – whether MEPA and MERA's least impact must be observed – would simply facilitate avoidance and postponement of this important issue until after the permit decision is issued.

By the same token, the issue of use of local labor, and the monitoring of the use of local labor is an important issue that should receive Commission consideration. Over and over again, applicants have repeatedly relied upon the use of local labor as a positive factor in the permitting process. Yet, despite assurances that the contested case process was unnecessary, because this issue could be fully explored, applicant has been allowed to avoid scrutiny. Once again, an

applicant is being allowed to claim the benefit of local hire, without being subjected to scrutiny. The local labor issue is explicitly made relevant by the Commission's own application guidance. This issue will appear again and again, and it is time that it gets the Commission attention it deserves.

**B. A final determination by the agency on the motion would materially advance the ultimate termination of the hearing.**

Petitioners contend that, in the absence of contested case proceedings, the record has not been adequately developed with respect to disputed facts that are directly relevant to the Commission's ultimate decisions to grant or deny a Certificate of Need and Site Permit. If the Commission agrees that a contested case proceeding is necessary for the development of the record, the opportunity to make that determination now could avoid months of delay. Conversely, if the Commission determines that contested case proceedings are unnecessary, certification of the issue to the Commission will have little or no impact on the schedule. This factor, too, weighs in favor of certification.

**C. The delay between the ruling and the motion to certify would not adversely affect the prevailing party.**

The first Order denying the Laborers Union's Motion was issued on August 2, but was subsequently vacated on August 10, and replaced with an amended order denying the Motion on August 14. The Order denying LCIA's Motion and request for party status was issued on August. Petitioners make this motion just a few business days after the final Order was issued. Accordingly, there has been no delay that would adversely affect opposing parties.

**D. To wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning.**

The Orders appear to prevent LCIA from participating in the case as a party with full rights, including the right to file exceptions to the ALJ's report and the right to appear before the



Commission as a party. If the Order denying LCIA's petition to intervene is not certified to the Commission, LCIA would have the choice to abandon further participation in the proceedings or continue to invest time and resources knowing that any comments and exceptions the organization files and efforts it makes could be rendered moot by their lack of party status. Denying that right to an organized citizen delegitimizes the process. But just as important, it leaves the MERA claims unresolved, and LCIA's right to bring those claims are simply deferred to the District Court, where the issues will be litigated at greater expense and in a more prolonged proceeding. In the Swan Lake litigation, an environmental group waited until after completion of public drainage proceedings, despite the fact that it might have intervened and raised the environmental issues in those proceedings. Nonetheless, the Court of Appeals held that failure to intervene at all, did not deprive the environmental group of the right to raise MERA issues in a district court proceeding. Significantly, the judicial process involved multiple trips to the court of appeals, and was ultimately decided only 5 years after the first Swan Lake decision authorized a district court action by a party that bypassed its opportunity to intervene at the administrative level. The effect of diverting these issues, to save a few months of time in a contested case, is penny wise and pound foolish.

Further, if the Commission must wait two or more months to consider the adequacy of the record in the absence of a contested case hearing until the time for a final decision, the prejudice asserted by the Applicant will be even greater and will weigh more heavily against Petitioners' case for further development of the record.

**E. It is necessary to promote the development of the full record and avoid remanding.**

As stated above, Petitioners contend that, in the absence of contested case proceedings, the record has not been adequately developed with respect to disputed facts that are directly

relevant to the Commission's ultimate decisions to grant or deny a Certificate of Need and Route Permit.

**F. The issues are solely within the expertise of the agency.**

Petitioners contend that the Commission is best suited to determine whether the disputed facts cited by the Laborers Union and LCIA are materially relevant to the Commission's ultimate decision, and whether full development of the record requires contested case proceedings. Thus, this factor weighs in favor of certification.

**V. CONCLUSION.**

For the reasons set forth above, the Laborers Union and LCIA respectfully request that the ALJ certify the Joint Motion and Order to the Commission to allow for Commission review of the issue.

Dated: August 21, 2018

RINKE NOONAN

THE LABORS DISTRICT COUNCIL OF  
MINNESOTA AND NORTH DAKOTA

/s/ Gerald W. VonKorff  
Gerald W. Von Korff, #113232  
Suite 300 US Bank Plaza Building  
1015 W. St. Germain St.  
P.O. Box 1497  
St. Cloud, MN 56302-1497  
(320) 251-6700  
(320) 656-3500 fax  
Email: Jvonkorff@RinkeNoonan.com

/s/ Kevin Pranis  
Kevin Pranis, Marketing Manager  
81 Little Canada Road East  
St. Paul, MN 55117  
(651) 653-9776  
Email; kpranis@liunagroc.com

*Attorneys for Lake Cochrane Improvement  
Association (LCIA)*

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS**  
**600 North Robert Street**  
**St. Paul, MN 55101**  
**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
**121 Seventh Place East Suite 350**  
**St. Paul, MN 55101**

In the Matter of the Application of Flying  
Cow Wind, LLC for a Certificate of Need  
for the 152 MW Large Wind Energy  
Conversion System in Yellow Medicine  
County, Minnesota;

MPUC Docket No. IP-6984/CN-17-676  
MPUC Docket No. IP-6984/WS-17-749  
OAH Docket No. 60-2500-35035

In the Matter of the Application of Flying  
Cow Wind, LLC for a Site Permit for the  
up to 152 MW Large Wind Energy  
Conversion System in Yellow Medicine  
County, Minnesota;

---

**Memorandum in Support of Certification of Issues**  
**Lake Cochrane Improvement Association**

---

The purpose of this memorandum is to clarify the position of the Lake Cochrane Improvement Association. The order denying the intervention petition and petition for contested case dramatically misstates the position of LCIA on the issues. A review of our two memoranda suggests that our position should have been reasonably clear. However, the order suggests that as the ALJ considers the motion to certify, it would be beneficial to underline what LCIA was actually seeking.

**A. LCIA Has Suggested Explicitly a Reasonable Alternative to the Applicant's Siting Proposal.**

The order rejects our requests because allegedly:

“LCIA’s Request for a Contested Case Hearing, not clearly state issues that need to be resolved, but rather identifies what are best described as areas of concern.”

That’s simply not the case. LCIA described exactly what issue should be resolved. LCIA’s position was stated succinctly and clearly. LCIA stated that a site permit that removed several turbines that are too close to the Lake Cochrane basin would be a vastly superior alternative to the site configuration as proposed. LCIA presented evidence that removing those turbines would be in harmony with the zoning on the opposite side of the Lake. LCIA showed that the Lake is part of a unified cross border watershed that is an ecological and economic unit. LCIA showed that the only governmental authority that has carefully considered the impacts found that to preserve the Lake Cochrane basin, turbines should be set back three miles from the Lake. LCIA presented a photograph showing visual impacts on a recreation area that is a scarce resource in this region. LCIA pointed out that the number of turbines had been in flux, and that there was no good reason why turbines could not be confined outside the three mile limit.

We are frankly mystified that these issues could be marginalized merely by calling them “areas of concern.” There is no “areas of concern” exception to the legal right to intervene or seek a contested case. When pipeline advocates sought an examination of alternative pipeline routes, it would not have been appropriate to say that their routing

objection was a mere “statement of concern.” LCIA filed an explicit petition, calling for the alteration of the site permit.

## **B. This Project Impacts Minnesota’s Environment.**

The order dismisses our right to intervene asserting that this project does not impact Minnesota’s environment. That is patently incorrect, and the law and facts overwhelming support the contrary conclusion. Our proposed findings contain a summary of the facts that support that conclusion, and those proposed findings were supported by evidence. Paragraphs 6 and 7 states LCIA’s

¶6: Lake Cochrane is part of the Lazurus sub watershed of the Lac qui Parle-Yellow Bank Watershed, which in Minnesota is governed by the watershed district of the same name. The sub watershed spans South Dakota and Minnesota. See Attachment A. The lakes, ponds, streams, ditches and wetlands in the Lac qui Parle-Yellow Bank watershed are important community assets, supplying recreational and aesthetic benefits, wildlife habitat, and fishery resources as well as provide for a strong economic growth for the local residents. (See Watershed Plan, p vii.) Almost half of the watershed lies in South Dakota.

¶7 Lake Cochrane is a regional asset that integrates into the regional economy and the regional environmental ecosystem. Each state has a responsibility to adjoining states to assure that developments do not infringe on the neighboring state’s environment. *See North Dakota v. State of Minnesota*, 263 U.S. 365 (1923). *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (fumes migrating across the border from copper smelting); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Tarrant Regional Water Dist. v. Herrmann*, 133 S.Ct. 2120 (2013).

This idea that one state can damage the border lake or river of another, simply because it is over the line is contrary to common sense, contrary to the practice of the two states, and contrary to law. All of our border resources are managed cooperatively in

recognition that pollution and ecological harm does not stop at the border. Each state has an environmental interest in the preservation of these border resources. The contention that Minnesota environmental law does not apply simply because a portion of the project has impacts beyond the state line has been emphatically rejected by the Federal District Court and the 8<sup>th</sup> Circuit Court of Appeals in *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030 (8th Cir. 2016).

Nor is it proper to prevent LCIA from exercising its MERA rights by ruling summarily in advance of an opportunity to vindicate those rights through appropriate due process. LCIA presented a MERA intervention petition properly verified that alleges that these turbines, which are located in Minnesota, negatively impact the environment in Minnesota. The fact that they also impair the environment in South Dakota is simply not grounds for rejecting that petition. At this stage in the procedure, the PUC must accept the allegations of the MERA petition as true. LCIA has presented evidence, that the Lake Cochrane basin is part of a Minnesota-South Dakota watershed. These turbines impact the land and air over a more than three mile distance across Minnesota. The suggestion that there is no impact on the Minnesota environment, simply because the Lake is on the South Dakota side of the border is absurd.

**C. The Order Improperly Imposes an Unlawful Deadline for Asserting MERA Rights.**

Nor is it appropriate to cut off LCIA's MERA rights simply because LCIA did not bring its MERA petition in the narrow and somewhat elliptical and ambiguous zone now retroactively assigned for intervention and contested case petitions. There is no such time

limit on MERA claims. In fact, in *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522 (Minn. Ct. App. 2006), the Court ruled that failure to protect intervention rights within the administrative time limits could not cut off MERA rights. The Court explained:

The plain language of MERA provides that its remedies “shall be *in addition to* any administrative ... rights and remedies now or hereafter available.” *Id.* (emphasis added). The legislature could have supplied an exception for MERA claims subject to drainage code proceedings. But it did not. And this court “cannot supply that which the legislature purposely omits or inadvertently overlooks.” *Wallace v. Comm'r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971). *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet Cty. Bd. of Cty. Comm'rs*, 711 N.W.2d 522, 525 (Minn. Ct. App. 2006)

The order misunderstands the impact of MERA. Under MERA, LCIA has the right to have its MERA rights vindicated either in this forum, or in the District Court. Denying this petition to intervene is not accelerating the applicants’ ultimate adjudication, it is actually substantially delaying its ultimate decision by deferring the MERA adjudication to the District Court. MERA recognizes that resources like the Lake Cochran basin and watershed are irreplaceable. There is no place, under MERA, for the PUC to say, too bad, you missed the one month when you can bring a MERA case, so you’ll just have to grin and bear the damage to the environment.

**D. The Order Wrongly Asserts that LCIA failed to propose a Superior Alternative.**

If we read the order correctly, it asserts that LCIA proposed no environmentally superior remedy. That simply is not the case. LCIA urged that the permit should be

modified to remove the turbines that were close to Lake Cochrane. Paragraph 18 of our proposed findings states:

The zoning authority for Lake Cochrane is Deuel County South Dakota. As a result of extensive study, the County established a three-mile setback for towers. While Deuel County does not have zoning authority over the proposed tower locations, the PUC, which has been granted corresponding land use regulatory authority should afford deference to the Deuel County's study and determination. The vast majority of towers proposed by the applicant are outside of the three-mile limit, if applied to Minnesota. Several towers in particular are located so as to be of concern. They are A2, T35, T2, T3, T5, T6, T36. The Deuel County zoning setback reflects the level of protection necessary to provide adequate protection compatible with environmental preservation, sustainable development, and the efficient use of resources.

**E. The order incorrectly states that the Deuel County zoning setback does not support LCIA's Contention that there are Disputed Facts.**

The order also rests rejection on the assertion that since it is uncontested that Deuel County has a zoning ordinance that it follows that the Deuel County ordinance does not support LCIA's contention that there are relevant disputed facts. With respect, this misunderstands the nature of facts and undisputed facts. The factual contention, the one that is disputed, is LCIA's contention that siting turbines within three miles of Lake Cochrane unduly impacts the environment. The Deuel County ordinance is one element of a universe of facts that supports that conclusion. LCIA also presented a study describing the visual impact of wind turbines and a mockup of the appearance of those turbines from the lake itself. Although the order suggests that this impact is exclusively on the Lake itself, in fact, the impact on the Minnesota side will be greater, the further into Minnesota one stands.



The Minnesota Public Utilities Commission has been granted pre-emptive zoning authority in conjunction with the legal framework for wind. But this case is proceeding as if the PUC was granted this authority so that it could ignore all zoning issues except for the interests of the wind energy applicant. Minnesota PUC has the same responsibility to the land and environment, and to the landowners impacted, in this regard, as does the Deuel County zoning authority. But the DOC-EERA is conducting its level of due diligence as if it is a wind energy promoter, not a zoning authority. As a zoning authority, the PUC has a responsibility to examine environmental and land use impacts as a fiduciary for the landowners and impacted citizens, and the work of the Deuel County zoning authority illustrates how that fiduciary duty ought to be handled.

## **F. Conclusion**

LCIA's petition for intervention qualifies under MERA. PUC's regulations and the ALJ's interest in administrative convenience do not override MERA. LCIA has submitted an intervention petition; its rights to petition are not discretionary with the PUC; they exist as a mandatory right to intervene to protect the environment. Having asserted that the Minnesota environment will be impacted supported by a verified petition, there is no provision in Minnesota law for sweeping those allegations to the side summarily. A circle with 3 miles in radius covers 28 square miles. Of those 28 square miles, 14 square miles, more or less, lies in Minnesota. The order asserts that there is no environmental impact on those 14 square miles because the center of that circle lies in

South Dakota. But the impact on Minnesota is just as real. Lake Cochrane is a regional asset, and the interest in maintain that environment is just as vital for Minnesota as it is for South Dakota.

Certifying these issues to the PUC will accelerate the ultimate resolution of these issues. The facts and legal findings necessary for the resolution of this case hinge on whether the order will be affirmed by the Commission, or whether the Commission will ultimately vindicate LCIA's MERA rights to be heard.

Dated: August 21, 2018

RINKE NOONAN

*/s/ Gerald W. VonKorff*

Gerald W. Von Korff, #113232  
Suite 300 US Bank Plaza Building  
1015 W. St. Germain St.  
P.O. Box 1497  
St. Cloud, MN 56302-1497  
(320) 251-6700  
(320) 656-3500 fax  
Email: Jvonkorff@RinkeNoonan.com

Attorneys for Lake Cochrane Improvement  
Association (LCIA)