

**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;

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

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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*

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