



December 15, 2009

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
127 7th Place East, Suite 350
St. Paul, MN 55101-2147

**RE: Office of Energy Security Energy Facility Permitting Comments and
Recommendation Submitted on September 4, 2009
Docket No. E282/WS-09-178**

Dear Dr. Haar:

Office of Energy Security Energy Facility Permitting (EFP) staff hereby reaffirms its September 4, 2009 position regarding the New Ulm Public Utilities Commission's (NUPUC) request for a variance from wind access buffer setback requirements.

On September 4, 2009, EFP staff provided Comments and Recommendations for Commission consideration in its deliberations concerning issuance of a draft site permit for the New Ulm Wind Project. In the following text, EFP reiterates its reasons and position on New Ulm's request for a variance.

Wind Access Buffer and Associated Setbacks

In its letter dated July 30, 2009, NUPUC requested a variance from the Commission's general wind permit standards. In particular, NUPUC requested a waiver of the wind access buffer setback of "5 rotor diameters (RD) from all boundaries of [a] developer's site control area (wind and land rights) on the predominant wind axis ... and 3 rotor diameters (RD) on the secondary wind axis" (Wind Turbine Setback Conditions, Order Establishing General Wind Permit Standards, Docket No. E,G999/M-07-1102). NUPUC noted that the wind access buffer setbacks are designed to protect wind rights and future development options. NUPUC argued that for the New Ulm wind project there is no need for such protection because (1) the surrounding topography makes adjacent land parcels ill-suited for future wind development, and (2) local property owners are opposed to wind development.

NUPUC reiterated this request in a letter dated November 24, 2009. It indicated that the New Ulm PUC and City Council have met jointly on three occasions to review and discuss New Ulm's wind project and that the Council and Commission:

Have resolved that until the MNPUC has acted on the request for the waiver of the MNPUC standards for the control of wind rights beyond those currently under lease, a decision regarding whether and how to move ahead with the acquisition of such additional wind rights cannot be made. Simply put, the New Ulm Public Utilities Commission is entitled to either, (1) a waiver of the standard and the issuance of a draft permit, or (2) the issuance of a draft permit conditioned upon compliance with the standard and issuance of a final permit within two years.

The New Ulm PUC letter also stated “a waiver is warranted in the case of the New Ulm Wind Project. The project is environmentally sound, economically justified and contains environmental benefits that outweigh the “Not In My Back Yard” argument put forth by a small group of vocal opponents. We believe that it is in the best interest of the State of Minnesota to approve the requested waiver in order to allow this project to proceed.”

As noted in EFP’s September 4, 2009 filing, EFP staff believes that a waiver of wind access buffer setbacks for the project is not appropriate for at least four reasons. First, a waiver based on the perceived interests of local property owners presents an unmanageable standard for the Commission. That is, if a waiver is granted for this project, how will future projects be distinguished? What are the perceived interests of local landowners? Are their interests congruent? Will they change over time? In contrast to NUPUC’s contention concerning local landowners, several citizen commenters suggested that they were not opposed to wind development on their property, but rather development being forced upon them (see, e.g., letter of Jeffrey Franta dated July 22, 2009).

Second, a waiver of wind access buffer setbacks does not protect possible future wind development. What is not technologically and economically feasible now may be in the future. Land that might be considered marginal for wind development now could be considered preferable in the future. Property owners who balk at current costs for wind development may be able to afford such development as costs decrease or advances in turbine technology facilitate development in less robust wind resource areas. Additionally, EFP staff has visited the project site, and nearby parcels, though somewhat lower in elevation, are not ill-suited for wind development.

Third, a waiver of wind buffer setbacks is not compatible with the state’s interest in siting large wind energy conversion systems in a manner “compatible with environmental preservation, sustainable development, and the efficient use of resources” (Minn. Stat. §216F.03). Upholding wind rights ensures the orderly and sustainable development of wind resources and provides wind developers, of all sizes and types, certainty in their planning.

Fourth, a waiver of wind buffer setbacks could place the Commission in the position of determining whether the wind rights of all landowners are equal, i.e., rights such that no landowner may take, without compensation, the wind rights of another. In the Order establishing general permit standards, several points were affirmed by the Commission: 1) with respect to the five by three buffer setback “This buffer setback has been shown to protect wind rights and future development options of adjacent landowners;” 2) “The wind access buffer setback is an external setback from lands and wind rights outside of an applicant’s site control, to protect the wind and property rights of persons outside the permitted project boundaries who are not participating in the project;” 3) “... the Commission finds no rationale in statute or rule to treat one person’s wind rights differently from another’s.”

It is the opinion of the OES EFP staff that the reasoning provided by the New Ulm PUC and City Council in requesting a variance from the wind access buffer fails to take into account why that standard has been established, and fails to provide sufficient justification for a waiver of the setback standard.

Draft Site Permit Issuance

Minnesota Rule 7854.0800 requires that, after acceptance of an LWECs site permit application,

“the Commission shall make a preliminary determination whether a permit should be issued or denied. If the preliminary determination is to issue a permit, the Commission shall prepare a draft site permit for the project.”

Issuance of a draft site permit looks forward to issuance of a final permit (“a permit”). If there is question about whether a final permit can issue, there is question about whether a draft permit can issue.

The rule does not provide criteria or guidance for making a preliminary determination. However, the experience and practice of OES EFP staff and the Commission does provide guidance. A determination to issue a draft site permit would not be appropriate if:

- (1) the applicant has not provided requested information following application acceptance,
- (2) the project has not progressed to a point where it appears that basic permit conditions and requirements could be met, or
- (3) conditions set by the Commission for issuance of a draft site permit have not been met.

The first criteria is not an issue for the New Ulm project, and the third criteria has apparently been met by NUPUC's submission to the Commission dated July 30, 2009. However, OES staff believes the second criterion has not been met – specifically, the New Ulm project does not have site control (wind rights) within the project boundary such that a final permit could be issued.

The Commission has not issued a draft site permit, nor has OES EFP staff recommended issuance of a draft site permit, where the applicant does not have sufficient site control or specifically state they intend to get control within the project boundary such that a project of the size proposed can be located within the boundary and meet all Commission setback standards. With respect to the New Ulm project, NUPUC appears to have site control for approximately half the acreage necessary to meet setback requirements (237 acres out of 550 acres in the project).

If NUPUC can gain site control through the use of eminent domain, there would appear to be no effective site control bar for issuance of a draft site permit. NUPUC noted that if it cannot obtain a waiver of Commission setbacks and cannot secure wind easement rights through negotiation, it will “exercise its powers of eminent domain to secure such rights” (NUPUC letter to the Commission, dated July 30, 2009, page 9).

OES EFP Analysis and Summary

Typically, Commission issuance of a site permit is triggered by a developer having or being able to demonstrate site control, typically 75 percent or more, at the time of draft site permit issuance. In this instance, New Ulm has approximately 50 percent of the wind rights necessary to comply with the Commission's permit requirements, which OES EFP staff believes is insufficient to warrant issuance of a draft site permit at this time.

When a wind developer is unable to acquire the wind rights necessary to meet the permit standards, the developer understands the necessity of amending or modifying the project footprint by working with willing landowners to meet the Commission's standards. This is a routine practice for independent power producers in the wind development industry.

New Ulm's inability to obtain voluntary wind rights from landowners is not sufficient reason for Commission consideration of a variance.

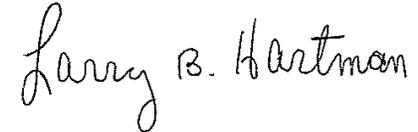
EFP staff has concluded that the New Ulm Wind Project, as proposed, does not comply with “the policy of the state to site LWESC in an orderly manner compatible with environmental preservation, sustainable development, and efficient use of resources” (Minn. Stat. §216E.03).

The Commission was provided with a proposed draft site permit on September 4, 2009. The language of that permit, as proposed, does not provide for any variances.

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EFP staff will be available at the December 21, 2009 Commission meeting to answer any questions the Commission may have.

Sincerely,

A handwritten signature in cursive script that reads "Larry B. Hartman".

/s/ LARRY B. HARTMAN
Office of Energy Security
Energy Facility Permitting

LBH/jl