STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF DEUEL	)	THIRD JUDICIAL CIRCUIT

In the Matter of PUC Docket EL19-027, Application of Crowned Ridge Wind II, LLC For a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties	
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, *Appellants,* vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and CROWNED RIDGE WIND II, LLC. *Appellees.*	19CIV20-000021 APPELLANTS' REPLY BRIEF TO CIRCUIT JUDGE ELSHERE (SDCL 1-26-33.3)

A. *Preliminary Statement*

Under statutes providing for a PUC Facility Siting Permit ("PUC Permit"), may the four homes and associated lands of the six Appellants be lawfully and permanently imprisoned within the boundaries of the Project, as designed by Crowned Ridge Wind II, LLC ("Applicant") and permitted by the PUC (sometimes, "Agency")?

The "Project Area" is reflected in the map at R000132 (*see* Appendix A-1, attached), while Applicant's "Project Map" appears at R000134 (*see* Appendix A-2). The four homes owned and occupied by the six Appellants (four red dots within the "Overview Map," serving as Exhibit A14-2), are reflected at R011280 (*see* Appendix A-3).

These maps resemble those presented to Deuel County for a conditional use of "real property," under SDCL 11-2-17.3, Appellants and their "real property" being embraced without consent. The permit issued by the Board of Adjustment extends to *all* Deuel County-sited land

and homes within Project boundaries. Applicant's boundary line runs counter to SDCL 43-2-1, as supported in the state's Constitution,[1] ownership being the "right of one . . . to possess and use [a thing] to the exclusion of others." The approved conditional use for all "real property" inside Applicant's boundary line (including Appellants) remains on appeal.[2]

Applicant's maps continue to embrace *without consent* the homes and properties of Appellants; the Order focuses on SDCL 49-41B-22, whether the facility will (or will not) "substantially impair the health, safety or welfare of the inhabitants." Conditions are imposed (citing SDCL 49-41B-25 as authority), two having particular relevance: # 26, Noise (related to Finding of Fact 46) and # 35, Shadow Flicker (Finding of Fact 47).[3] The Order's practical effect is *as if* an easement is taken, without compensation, for a permanent burden of the "Effects." The failure or refusal to adopt rules to quantify, qualify or condition the "Effects" (Noise and Shadow Flicker) magnifies the error.

B. *State Law Easement Requirements*

The topic of wind easements has received the Legislature's attention through a series of interrelated and often amended statutes, SDCL 43-13-16, *et seq*. A "wind easement" is a right "executed by or on behalf of any owner of land or air space for the purposes of ensuring adequate exposure of a wind power system to the winds, or an agreement to refrain from developing a wind power system." The "easement runs with the land or lands benefited or

---

1 Article VI, §§ 1, 13, S.D. Constitution.

2 In 19CIV18-000061, *In the Matter of Special Exception Permit Application of Crowned Ridge Wind II, LLC, et al.*, this Court, by memorandum decision May 19, 2020, affirmed the Board's 2018 order, within the confines of certiorari review; presently before the Supreme Court, Appeal # 29352.

3 These Effects from a wind farm are like feeding corn to hogs, the resulting "Effect" an assault on olfactory system if "through-puts" are emitted too close to residential uses. Different sensory organs are assaulted, but this land use has much in common with a swine CAFO.

burdened and . . . may not exceed fifty years." SDCL 43-13-17. Meanwhile, SDCL 43-13-19 provides a tract of land may be leased for a "period not to exceed fifty years."

This collection of statutes does not require a "wind easement" be secured from every owner of "land or air space" in the vicinity. While the PUC finds that "Applicant has entered into lease and easement agreements with private landowners within the Project Area for the placement of Project infrastructure,"[4] that finding pertains to *Participants*. "Project infrastructure" is not the *only* burden to be assigned or assumed.[5]

The massive record succinctly summarizes the *outsourced burdens* of Effects; prepared by Applicant's expert witness (Haley), a chart of "Deuel County occupied structures" (Non-Participating *and* Participating) calculates Noise (R000507, *see* Appendix B, annexed), while another offers "Shadow Flicker" predictions (R005047, *see* Appendix C). Participants may support this Project in large numbers, but a *much* greater number of residential structures of *Non-Participants* are *negatively impacted* by the Effects, even if "in compliance" with the Zoning Ordinance (as amended in 2017), and the PUC's own *ad hoc* determinations.[6]

Concerning this Project, the famed noise expert hired by PUC's Staff (David Hessler) noted it was "aggressively devised."[7] The witness would like to see "more effort made to get the sound levels down," with 40 dBA (at the homes of Non-Participants) being the ideal.[8]

---

[4] Order, Finding # 8, at 5.

[5] Voluntary assumption of burdens by easement is understood; assignment of non-consensual burdens to Appellants, merely by authority of PUC Permit, is the point of this challenge.

[6] As the PUC, without adopting regulations, follows the same tolerance limits as Deuel County, a fair question is just *who or what* empowered Deuel County (with regulations) to impose Applicant's specific burdens upon Non-Participants (also as non-applicants)? The issue is now before the Supreme Court in Appeal # 29352 (*see* n. 2, above).

[7] An opinion expressed in Ex. S2, at 3, described as "being dense in the sense of . . . trying to put a lot of turbines into the project area." TR 498:18-499:25. This rather profound opinion is never mentioned even once in the briefs of Appellees here, nor in the PUC's Order.

[8] TR 502. The chart, Appendix B, reflects that a majority of Non-Participant homes in Deuel County exceed the "ideal" referenced by witness Hessler.

Applicant's expert Haley further notes, as to Shadow Flicker, that this Effect is "most noticeable within approximately 1,000 meters of the turbine, and becomes more and more diffused as the distance increases." Beyond 1,700 meters, it becomes indistinguishable.[9] The chart in Appellants' Opening Brief, at 7, notes the names, receptor codes, Effects duration or intensity, and distance (in feet) to nearest turbine for each of the Appellants' homes. Each home is between 608 and 856 meters distant, well within the range of 1,000 meters (3,208 feet), where, according to Applicant's witness Haley, Shadow Flicker is "most noticeable."

The separation distance of wind turbines and Non-Participant homes is governed, in the first instance, by the Zoning Ordinance, the distance required being four times the height of the turbine (about 1,945 feet). The *separation distance* observed to Appellants' homes is slightly greater than the *required distance*, but this, too, fails to protect from the Effects burdens.

For spatial considerations, PUC follows the footsteps of Deuel County,[10] giving rise to this present concern: does this Agency have lawful authority to approve Applicant's scheme, ratifying the casting of Effects onto the nearby lands and homes of those who have not given a volitional easement for the privilege?[11] If the State *itself* was planning this very wind farm as a state-owned proprietary venture,[12] might the Governor and her staff impose a Project Map of like design, demanding that those behind the line and having no choice in the matter, must simply accept and endure the use, without need of unleashing the Eminent Domain Power? That the Facility Siting Power may work to shoehorn an "aggressively devised" Project into the Goodwin neighborhood allocating a dose of Effects for all, seems a doubtful proposition.

---

9 R005040-41, prepared testimony of Haley. This translates to about 5,577 feet.

10 For Noise and Shadow Flicker parameters, the PUC has no governing regulations, choosing to rely on the opinions of hired experts on a case-by-case basis.

11 As SDCL 43-13-4 otherwise seems to require.

12 One that is "aggressively devised" as Staff's expert has opined; this assumes Art. XXIX, § 1, S.D. Const. would permit investment in such a venture.

On the topic of spreading these Effects onto the property of Non-Participants, the Legislature has little (actually, nothing) to say in either Chapter 43-13 or Chapter 49-41B. An easement is not statutorily required with landowners (as servient owner), unless a "wind easement" (as defined in SDCL 43-13-17) is obtained. No lease is statutorily required either, unless within the concept of SDCL 43-13-19. Meanwhile, the Agency has adopted no relevant regulations.[13] Applicant may have assumed *no easement* is required in dealing with the property interests of Non-participants,[14] but that assumption is wrong.

C. *Applicant Wrote the "Effects Easement"*

As noted by the Court in *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 12, 827 N.W.2d 871:

> "An easement is 'an interest in the land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists.'" *Brown v. Hanson*, 2007 S.D. 134, ¶ 6, 743 N.W.2d 677, 679 (quoting *Knight v. Madison*, 2001 S.D. 120, ¶ 4, 634 N.W.2d 540, 541).

In the current context, the "owner of such interest" would be someone in Applicant's posture, desiring to make some "limited use or enjoyment" of land, while the "land in the possession of another" would be a reference to the homes and lands of Appellants. The "limited use or enjoyment" at issue in *Brandt* was that of a 200-foot wide drainage easement conferred by the owner within a plat. (Applicant, of course, holds *no interests whatsoever* in the real property of Appellants, now reiterating the thought that the County's Board of Adjustment, acting upon a conditional use permit, and the PUC, determining to issue a Permit here, lack the

[13] A regulation requiring easements from those receiving "Effects" would be a good start; another is requiring, in absence of an easement, the "Effects" be measured at property lines.

[14] Unless the Effects exceed limits of 30 hours and 45 dBA; this is the "Stanton standard" now ubiquitous throughout South Dakota, as referenced *infra*, beginning n. 29.

jurisdiction and power to enter in favor of Applicant *easements-by-edict*, purportedly allowing some "limited use or enjoyment" of the adjoining lands and homes of Appellants.)

Few if any examples of the easements (or leases) held by Applicant appear in the record, the usual effort being to submit recording memoranda with Participants, disclosing only legal descriptions, with section or paragraph titles rather than text. One clear exception to this is Exhibit I-2, at R-013269, being the "Wind Farm Lease and Easement Agreement," structured as an exclusive option with a partial date of 2013 in favor of Crowned Ridge Wind Energy Center, LLC, an affiliate of NextEra Energy Resources, LLC.

The provisions of this document (often referenced as the "Kranz Easement," as presented to Appellant Kranz but never executed by her) are important for purposes of placing into this record the actual text of the easements directly relevant to the "Effects," reflective of the *claimed* lawful right to dispose thereof upon the lands and homes of those in privity.[15] The PUC's Order fails to reflect any Staff or official interest in the provisions of the Kranz Easement, or the property interests of Appellants (beyond citing their names). This proposed instrument is crucial to an understanding of Appellants' argument: The PUC Permit (as the source of authority for Applicant's intended "limited use or enjoyment"[16] of Appellants' lands and homes) purports to serve also as a *de facto* easement.[17]

After the conclusion of the hearing (February 2020), Applicant belatedly disclosed one additional easement type, that being a so-called "Participation Agreement" structured as an option, marked and received as Exhibit I-8 (R013805). This apparent one-of-a-kind document,

---

[15] Appellants' Opening Brief, at 5, quotes Kranz Easement, Section 5.2, "Effects Easement," and Section 11.10, "Remediation of Glare and Shadow Flicker."

[16] A key aspect of an easement, *Brandt v. County of Pennington*, 2013 S.D. 22, at ¶ 12.

[17] A township ordinance, requiring daylight access to relict cemeteries, as in *Knick v. Township of Scott*, referenced at 19, *infra*, seems also a *de facto* easement although that term is not used by the Court. *Knick* is a recent focal point for takings by local governments.

dated July 23, 2019, provides "easements" (both for wind currents and for "effects" caused by the wind farm) for an approximate 4.18 acre parcel described in Exhibit A (R013810).[18] A release by Owner is included, for loss or harm from "nuisance, trespass, disturbance, effects, diminishment of the value of the Property, proximity of the Wind Farm to Owner's Property and/or residence, diminishment or interference with the ability to use or enjoy the Property," and so forth – in other words, each being also of abundant concern to these Appellants.[19]

Notwithstanding the expert prognostications and opinions (to the general effect the "Effects" cause *no harm whatsoever* to humans or their property interests), the potential impact of the "Effects" is certainly on the minds of those writing legal instruments for Applicant.[20] In relationship to each "Participant,"[21] Applicant's legal footing leads off with the "Effects Easement" (but a small part of the text of the instrument, often entitled "Wind Farm Lease and Easement Agreement"), and then stands on the County-issued Conditional Use Permit, and now, this PUC Permit. Each of these permits expressly approves an identical – or nearly identical – duration or dose of "Effects" for *each* home. For Participants (some are neighbors to Appellants, while others merely own land, but live elsewhere), one fervently hopes the remuneration promised is a fully adequate price, considering this coming, permanent invasion.

As to Appellants (part of a larger group of Non-Participants), of course, *no* such legal instruments are in place. (No remuneration has been paid, no amount would likely suffice – but it is hard to say, since that conversation *never* happened, except with Appellant Kranz.) With a permanent use of Appellants' homes and lands for disposal of the Effects being proposed, just

---

[18] The Participation Agreement lacks lease terms, as the small site is not host for a wind turbine.

[19] These are the *very* kinds of risks, injuries and harms that, according to the repeated assurances of a parade of experts, hired by Applicant and the PUC, filling much of a 14,000+ page record as to the *unlikeliness* of such risks, injuries, damages and harms. The "release," at R013806-7, exceeds comparable terms of the much longer Kranz Easement, Exhibit 1-2.

[20] "The lady doth protest too much, methinks," *Hamlet*, Art III, Scene II.

two items stand in Applicant's corner: a County-issued CUP, which itself is dependent *also* upon the issuance of the second, namely, this PUC Permit. Appellees each seem to answer: *no easement is required - these Permits are sufficient for the task!*

Without serious question, the PUC Permit affects land and interferes with land titles. The need to accommodate the "Effects" flowing from this Project, by virtue of an "Effects Easement," is itself suggested by Applicant's own instruments and authorship.[22] To be sure, Applicant holds the consent of Participants, but lacks that of Non-Participants. In the absence of an easement by the landowner, the PUC has no clear or apparent jurisdiction – under SDCL 49-41B-22 or elsewhere – to affirmatively declare that Applicant may now invade the lands and properties (and homes) of all, even those failing to consent to such intrusions.[23] Eminent domain is not one of this Agency's powers; without it, the authority to lay off burdens seems short.[24]

In *Geiger v. McMahon*, 31 S.D. 95, 139 N.W. 958 (1913), the defendant – based on the strength of a permit issued by the state engineer to appropriate water – commenced to dig a new, second ditch across plaintiff's lands. The Court observed:

> The permit to appropriate a portion of the waters of Spring creek, given to defendant by the state engineer, will in no manner assist defendant in this case. The permit given to appropriate water by the state engineer, under the statute of this state, can only give a permit to appropriate public waters which are the proper subject of appropriation for the purposes of irrigation. *The state engineer, by a permit to appropriate water, cannot take land, or an interest in land, from one*

---

[21] And the one small-tract owner accepting the "Participation Agreement."

[22] Applicant's own writings (Section 5.2, Effects Easement) describe both a servient and a dominant estate, as commonly found in easements appurtenant.

[23] Appellant Kranz refused to execute the Kranz Easement. Regardless, Applicant possesses the PUC Permit, affording the very same result contemplated by § 5.2, Effects Easement.

[24] *In Matter of Certain Territorial Elec. Boundaries (Aberdeen City Vicinity)*, 281 N.W.2d 72 (S.D. 1979), the Court distinguished the agency's regulatory authority from that of the power of eminent domain. Thus, SDCL 49-41B-22 should be seen only as a charter to ensure Applicant's design does not overreach willing Participants; it is not an agency power to compel others, *such as these unwilling Appellants*, to swallow a prescribed dose of Effects on property, which the agency insists is within its purview to administer on an *ad hoc* basis. *Section E* of this brief, at 14, will examine the *apparent* source of this claimed "authority."

> *person and give it to another, or otherwise interfere with land titles.* The state engineer, by his permit, cannot give one person the lawful right to convey water over and across the lands of another by means of an irrigation ditch, without the consent of the landowner. (*Emphasis supplied*) 139 N.W. at 960.

Likewise, the PUC today serves as a regulatory body for the siting of some "energy conversion" scheme (requiring findings that such will not cause harm to those living and owning lands in the siting area), but it does not follow that the PUC's regulatory approval process, *per force*, then serves as a good substitute as an instrument expressing volitional landowner consent. *That very consent, in the form or nature of an easement, is precisely what Applicant and this "aggressively devised" Project yet lack.*

D. *SDCL 43-13-2(8) is a Real Statute*

Wind farms (like this Project) might not have been in the minds of the territorial legislature in 1877, having adopted Section 244 of the Civil Code that year, a statute describing "land burdens or servitudes," patterned after Section 801 of the California Civil Code. This law concerns the "right of . . . discharging [light] upon or over land," now appears as SDCL 43-13-2(8), being a companion to SDCL 43-1-5 (Section 166 of Civil Code 1877), providing "[a] thing is deemed incidental or appurtenant to land when it is by right used with the land for its benefit . . . or of a passage for light . . . from or across the land of another." These statutes are not mentioned in the work product of Applicant's writers, but are foundational to the "Effects Easement" itself; they are also the crux of *Issue 2*, of Appellants' Opening Brief, at 18.

With the exception of the old *Kennedy v. Burnap* decision of the California Supreme Court,[25] the California template for Dakota Territory's own statute has received little attention in the courts. South Dakota's version, meanwhile, has received none, despite being in effect for more than 140 years and predating by several years the patent deeds for the property now

[25] 120 Cal. 488, 52 P. 843 (1898), cited at in Appellants' Opening Brief, at 23.

owned by Appellant Kranz.[26] This old statute is thus a contemporaneous ingredient of that bundle of sticks now comprising fee simple title vested in the name of Appellant Kranz. Staff's brief, at 11, maintains it has *no* duty to apply SDCL 43-13-2, as it is a body of limited jurisdiction, able to promulgate rules only when "the Legislature specifically confers that authority via statute." Appellants agree with that assertion. The rub is, *here*, the PUC is authorized to promulgate rules but has failed to do so. Regulating large-scale wind farms with *ad hoc* determinations of hired experts, opining as to an appropriate (or perhaps survivable) level of Effects the Agency may gift to each of the neighbors, seems like exhausting work.

But, the PUC is not entitled to simply ignore provisions favorable to Non-Participant landowners simply because Applicant has chosen to do so. The Agency has done so under the apparent pretense that the Permits have no actual effect upon title, or the use and enjoyment of neighboring lands and homes. *This*, after a 14,000+ page record filled with reports, studies, projections and computer testing, all intended to demonstrate that the claims and concerns about annoyance and sleep deprivation, and noise and the distractions associated with Shadow Flicker, are just mere annoyances and will not lead to ill health effects. In other words, *no one should die from these Effects*. The Effects are not just being experienced by the public traveling near the Project. This Project is constructed in and among long-established land uses, near homes that have existed for many decades. The Effects, because of the PUC Permit, will now come to homes and properties of owners who extended no Effects Easement to Applicant.[27]

---

[26] The South Half of Section 20, T116N, R50W, Deuel County, as referenced in *Affidavit of Laretta Kranz*, Exhibit I-4, at R0133301; the homestead patent for the SE1/4 thereof was issued to one John Bemis on June 30, 1888; the timber culture claim for the SW1/4 issued to one George W. Norris on August 4, 1891; original Government Land Office records accessed at **https://glorecords.blm.gov**

[27] The PUC's failure to adopt regulations (such as, requiring that easements be obtained from *all* landowners receiving the Effects – *Participating or not*) begs this question: would not such a regulation be in complete harmony with South Dakota's property law scheme?

The Agency did take the time to note this much about easements and such: "Applicant has entered into lease and easement agreements within the Project Area for the placement of Project infrastructure." Order, ¶ 8. As to the property interests and claims of Appellants, the PUC has noted their names, but otherwise ignores the issues they raised before the Agency.

Staff's claim, at 12, that "there is no statutory provision that instructs or even permits the Commission to adjudicate and interpret laws falling outside of the Commission's authority" – may be facially correct, but is also rather disingenuous. The Agency (much like the state engineer in *Geiger*) does *not* have actual, delegated authority to declare or open easements across the lands of a non-consenting landowner.[28] Agency's authority to fix the lawful dose of "Effects" for homeowners and property is merely Stanton's idea, now writ large.[29]

Absent the acceptance of these burdens by the landowner – by means of an Effects Easement or like instrument, there is no actual statutory authority for Stanton's premise that this Agency, by force of decree (or permit), may allocate the burdens, Effects that homeowners must bear and that Applicant may lawfully place upon them permanently, in order to bring to fruition an "aggressively devised" Project.[30] The PUC certainly has *some* range of authority under Chapter 49-41B, SDCL. But, Stanton's notion that the Agency, by edict, may parcel out or ratify burdens upon "real property"[31] adversely affected by wind farm proximity (a spatial

---

[28] Likewise, the State itself does not have such authority, at least not because of a legislative delegation in the form of the Zoning Power or the Facility Siting Power. Use of the Eminent Domain power would be quite another matter, if used for a public purpose. Is this a public purpose?

[29] Tom Stanton, Principal Researcher for National Regulatory Research Institute (NRRI), an affiliate of National Association of Regulatory Utility Commissioners (NARUC); Stanton's work, released in January 2012, is discussed, *infra*. The PUC denies Stanton's report formed the Agency's views, but several of the experts appearing or presenting in this case, David Hessler in particular, contributed to *Stanton's* work and "Table 6." See n. 37, *infra*.

[30] The opinion of Staff's expert David Hessler, Exhibit S2, R012746.

[31] Just as the Board of Adjustment claimed under the authority of SDCL 11-2-17.3.

relationship precipitated entirely by Applicant's own "aggressively devised" design, *implemented without benefit of any easement*), is also a legal fiction.

E. *Delegation of Authority*

In *First National Bank of Minneapolis v. Kehn Ranch*, 394 N.W.2d 709, the Court reviewed the delegation of authority restraints imposed by Art. III, § 1, South Dakota Constitution, and the need for standards, noting (at 718):

> [T]he Legislature may delegate quasi-legislative powers to an administrative agency for the purpose of carrying legislation into effect. . . . In order for there to be a proper delegation of authority to an administrative agency there must be (1) a clearly expressed legislative will to delegate power, and (2) a sufficient guide or standard to guide the agency.

As to the topic of "energy conversion" facilities under Ch. 49-41B, SDCL, does the delegation that exists clearly include the agency's right to state and express burdens upon the land and homes of nearby Non-Participants (those who have given no easement for the servitude)? While the PUC has authority to write regulations carrying out this delegation, it has chosen to regulate wind farms – as to the burden of Effects – on an *ad hoc* basis. Over the history of like permits, the results are similar if not identical, with but one exception.[32]

In the absence of a clear statutory reference or an agency regulation construing the delegation of authority, where did PUC Staff get the idea to recommend (as here) a Noise limit of 45 dBA, and Shadow Flicker of 30 hours? The testimony of Darren Kearney notes that Staff relies on "our experts and county ordinances and state law." (TR 574:11) When asked about a certain "NARUC Best Practices Report," (hereafter "NARUC BPR") dated January 2012, witness Kearney said he'd heard of it but had not studied nor even looked at it. (TR 567:12).[33]

---

[32] This exception, as discussed in opening brief, at 10, being Docket EL-026, *Prevailing Wind Park, LLC* (Order issued November 28, 2018), establishing Shadow Flicker limit of 15 hours per year *and 15 minutes per day*, and a Noise limit of 40 dBA.

[33] Kearny's testimony is discussed in Appellants' Opening Brief, at 13-16.

Appellants submitted their "Application for Party Status (Corrected)" to the PUC on August 6, 2019, questioning (among many other concerns) *why* both the County's Zoning Ordinance and the PUC suddenly (circa 2017 or 2018) settled on a Shadow Flicker tolerance of 30 hours per year (except for the *Prevailing Winds* anomaly, as noted). (R001197). The text of note 2 (R001200) bears repeating here:

> How did that happen, if not from the impetus of the "best practices" report, issued January 2012, entitled "Wind Energy & Wind Park Siting and Zoning Best Practices and Guidance for States," a project of The National Association of Regulatory Utility Commissioners, commonly called NARUC. This specific report is directed to the Minnesota Public Utilities Commission and was funded, yes, by the U.S. DOE. Interestingly, at 31, the report observes: "A reasonable standard can rely on micro-siting modeling to ensure that shadow flicker will not exceed 30 hours per year or 30 minutes per day at any occupied building. These are the most commonly used guidelines (Lampeter, 2011, pp. 5-14)." Applicant's "company witness," Richard Lampeter is thus relied on *directly* for LFN-infrasound and then *indirectly* for shadow flicker guidance, his professional activities being funded either by NextEra Energy or US DOE. The professional views of such a key "company witness" should not be accepted by this Commission without further input from experts not otherwise working fulltime to advance the incipient interests of Big Wind. Bottom line, neither Lampeter's work, nor NARUC studies or US DOE, have even briefly considered the basic function of state property law – is the easement (such as Section 5.2 of Lease & Easement tellingly suggests) *required* to lawfully emit and dump upon adjoining landowners the deleterious operational effects of wind turbines, or is a Facility Siting Permit (and CUP) a legally sufficient cure for the absence of an Effects Easement? We think not but before rushing along, in keeping with the straight-jacket of the Legislature's short timetable, it is time to consider that issue.

Appellants' Application went on to ask crucial questions (particularly at 5, R001201, a true copy annexed as Appendix D, with particular emphasis on the second, third and fourth paragraphs). These salient questions remain entirely unaddressed and unanswered by the agency. (The NARUC BPR, January 2012, is available at pubs.naruc.org, and is accessible also at http://www.nrri.org/pubs/electricity/NRRI_Wind_Siting_Jan12-03.pdf.)

NARUC BPR, it should be noted, was authored by one Tom Stanton, as the Principal Researcher for National Regulatory Research Institute, an affiliate of National Association of Regulatory Utility Commissioners ("NARUC"). Stanton's report notes the writings and research of others (several having served as experts either for Staff or for Applicant itself in this

case), yet the author never discusses (*not once*), much less resolves, the issues that are evident (to Appellants) in this case: *where* does a regulatory agency find the legal authority for the solutions it proposes? This question is germane, as in 2017 Deuel County adopted the solutions proposed by Stanton,[34] followed by a Conditional Use Permit in 2018, founded on the very same asserted solutions. Also in 2017, the PUC started imposing "Stanton's solutions" within the list of wind farm cases referenced in Kearny's testimony.[35]

Stanton's NARUC BPR is also of particular interest, as Staff's own expert (David Hessler) wrote Stanton's guideline for sound (TR 500). Stanton's NARUC BPR ends by creating guidelines for the Effects of concern to Appellants, both Noise and Shadow Flicker.[36] Thus, while Staff professes to have paid no attention to it, the PUC *is* closely following Stanton's recommended tolerance limits for these Effects, although in an abbreviated fashion for Shadow Flicker. In the *Prevailing Winds* case, *both* an annual and daily limit for Shadow Flicker were devised,[37] but at respective endurance limits below what Stanton thought proper.

Stanton, as author of NARUC BPR, made no reported effort to study whether Non-Participants themselves (those having given no easement for the Project and resisting the

---

[34] Stanton's purported solutions are referenced in n. 36, following. The substantive changes to the Zoning Ordinance in 2017 – imitated also that same year by the PUC, on *ad hoc* basis – did *not* come from thin air. Stanton's work was published January, 2012.

[35] Exhibit S1, R011799, at 011808. "Stanton's solutions" were not applied prior to 2017.

[36] Table 6 of NARUC BPR, at 27; this single page appears in Appendix E, annexed. Table 6 is now applied by the PUC and Staff's hired experts as guiding principles for exercising the Facility Siting Power, even though Staff analyst Kearny claims not to have read it.

[37] As referenced in Appellants' Opening Brief, at 16-17 (and also, *Post-Hearing Brief of Intervenors*, at 13-25, R013821), the German source article for Shadow Flicker limits, relied on by Applicant's expert Ollson, sponsor of Exhibit CO-S-1 (R002009) and Exhibit CO-S-16 (R002319), identifies *three* time limit measures. The PUC and local Board use but *one* (except in *Prevailing Winds*, where *two* were employed)! *The PUC's Order here addresses none of these concerns*. Stanton's seminal work concluded *two* time measures should be employed, Agency uses but *one* here – the German authority cited by Applicant's experts as the origin publication includes *three* separate time limits. Why is only *one* duration limit applied upon Appellants' homes? Appellees' briefs say nothing of this curious mystery.

assignment of burdens upon their property) *might* have some vested property right at stake. Stanton's solution simply assumes that state and local governments – in the exercise of a Facility Siting Power (as involved here), or the Zoning Power – will *always* trump the vested property interests of reticent neighbors. (Thus far, Stanton seems rather prescient.)

This is the fundamental error behind the PUC's Order in this case: the Agency approved the "Effects" burden, negotiated and worked out between Staff and Applicant, with a Permit *specifying* the duration or intensity of the Effects that are *imposed as a burden* upon the homes and lands of Non-Participants. As to the issues listed within Appellants' "Application for Party Status (Corrected)" (as cited at 14-15, above), the Order fails to mention, much less discuss, even one.

Appellees each urge the Court to ignore the claims of Appellants, due to the paucity of cited precedent. These claims are really matters of first impression: the licensing schemes of state or local governments would seldom – *if ever* – lay off onto the neighbors the specific burdens (with specified values) of the negative aspects of an Applicant's land use proposition. But – that is *exactly* how *this* scheme works. Deuel County (in 2017) adopted zoning regulations that mimic Stanton's Table 6 (issued January 2012, see n. 36, above), and in that very same year (2017), the PUC began to echo Stanton's theories as embraced by the Zoning Ordinance. (Neither government, of course, admits that Stanton was the author of this concept.)

However, Stanton neither addressed nor answered this essential question: in giving approval to Applicant, how might the Agency impose specific burdens of Effects upon the homes and lands of Non-Participant neighbors, who are otherwise secure in their own vested rights, uses and enjoyments, and are not proposing to intensify their uses? *They have applied for nothing!* Yet, they are now transformed into *servient tenements*, not by volitional instrument but by the sheer force of governmental edict. Stanton, whose work has been copied by Deuel

County and a host of other South Dakota counties, never once mentions or reckons with important legal concepts, such as "easements," "burdens" or "servitudes," in relationship to the property of Non-Participants. Stanton's work is a regulatory wish list expressed by those experts often hired by Applicant and Staff, particularly as to the property of Non-Participants. The fact of governmental adoption or adherence to that list does not transcend vested property rights.

The Agency has no more legal authority to approve, require or permit the laying of Effects burdens (absent a volitional easement) than the state engineer in *Geiger* had to require that the landowner allow the digging of a ditch necessary to carry the allocation of water expressly approved by that officer's permit. For those desiring that ditches be dug so that their water may be carried across the lands of others (or to cast the Effects of their Project upon homes and lands they don't own), one first needs to obtain - *an easement.*

F. *Nuisance, Easements, Takings & Ripeness*

A large body of on-line literature demonstrates that wind farms, *much like this Project*, are often the targets of nuisance litigation.[38] Having garnered two separate agency orders and Permits, allowing Applicant to proceed and operate, each purports also to franchise Applicant in the casting of such Effects upon Appellants and their homes. Such Permits set a government-approved standard for conduct, the effect being to immunize Applicant from future nuisance claims, at least as to (and up to) *that* specified, explicit level of Effects.

Staff's brief, at 15, asserts the PUC Permit is not the cause of "noise and shadow flicker . . . emitted onto Appellants' property;" besides, state law prohibits the Agency from mandating

[38] Several examples: Jake Hays, *Feeling the Noise: Proposed Standards and Alternatives to Wind Energy Nuisance Litigation*, 28 Forham Env. L.R. 242, Sp. 2017; Joseph Haupt, *A Right to Wind? Promoting Wind Energy by Limiting the Possibility of Nuisance Litigation*, Journal Energy & Environmental Law, Summer 2012, at 256; Ryan Kusmin, *Sucking the Air out of Wind Energy: Nuisance Litigation and Its Effect on Wind Energy Development*, 88 Wash. U. Law Rev. 3, 707 (2011).

any locations of a wind energy facility (relying on SDCL 49-41B-36). Staff claims the Effects are actually regulated by the County, not the Agency. To reach that argument, Staff cites *Benson v. State*, 710 N.W.2d 131 (2006), and the federal takings cases developed to that point in time. Many of the cases cited in *Benson* are distinguishable, being those who claim a deprivation of property rights while merely looking to intensify their own uses of land. Here, by contrast, Appellants have "property-related expectations that are worthy of a great deal of constitutional respect because they seek to *continue* their current land uses without the government-created interference."[39]

If the PUC is solely focused on "health, safety and welfare" of the inhabitants,[40] why would it rely on the *same* experts, the *same* testimony, and the *same* "Stanton standards" as are now found in the Zoning Ordinance, where the crucial Effects limits (even if applied by the PUC on an *ad hoc* basis) all turn on predicted experiences for those at an occupied residence of Non-Participants? If not in the business of regulating Effects *on and into property* (specifically, a home), then an entirely safe and appropriate place to impose limits on Effects is at the *property line* of Non-Participants. Clearly, the PUC is in the business of ratifying turbine locations or, sometimes, moving them around a bit, as the experts might suggest. At the end of the case, the Order imposes a ceiling for Noise and Shadow Flicker levels that, for the most part, squares *entirely* with Stanton's ideas as well as the Conditional Use Permit (the latter being largely a copy of Stanton's ideas). Each edict predicts the intensity or duration of Effects at or upon specific points. This isn't unusual if the exaction points are on *Applicant's* own property or the shared property line; these are on the *very homes and properties* of *Appellants*. Stanton's precepts notwithstanding, this Agency is not free to make *such* calls at *those* locations.

---

[39] Carlos Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 Boston Univ. L. R., 819, at 824.

Several writers[41] suggest wind farm development must be protected in the manner of Right-to-Farm (RTF) legislation. The Iowa Supreme Court famously determined, in *Bormann v. Board of Sup'rs in and for Kossuth County*, 584 N.W.2d 309 (1998), that state's RTF provisions, immunizing an "agricultural area" (as designated by the County Board, in this case, a 960-acre enclave) from nuisance claims, was unconstitutional:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates value private property interests and awards them to strangers. *Id*., at 322.

The *Bormann* decision rests in part on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), wherein a railroad with the power of eminent domain operated a tunnel, near residential property; the Court concluded *Richards* was entitled to compensation for the invasion of property by gases and smoke. The state, *Bormann* observed, "cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance.[42]

The government's action, in setting a regulatory limit for Effects measured at *homes* (where such Effects did not previously exist), is little more than an exaction but one required of Non-Participants. It is *as if* Applicant is a charity, passing the offering plate and, as determined by the PUC, a contribution of "Enjoyment for Effects" is rightly due from Appellants. Applicant now holds a Permit to do so, issued by the Agency - notwithstanding the self-admitted evidence that such can become an annoyance and will threaten the enjoyment of property. SDCL 21-10-1

---

[40] SDCL 49-41B-22(3)

[41] Including two of the three referenced in n. 38 – Haupt and Kusmin.

[42] Ball, the author referenced in n. 39, writes extensively on *Richards* and the impact of "special and peculiar" governmental interference with enjoyment. Allowing Applicant a Permit for "real property" that embraces Appellants and homes within Project boundaries, without need of consent or easement, is a clear marker of such interference.

is focused on nuisances, by those "unlawfully doing an act." Government has followed the wind farm musings of Stanton, espousing the theory this Agency *may* impose Effects, as an exactment upon the property of mere neighbors, those seeking no zoning relief. As a bonus, this purported standard for Effects serves also - to that extent - as a shield for nuisance claims.

Appellees both suggest this case is not yet ripe; the computer models presented to the Agency are conservative projections for each receptor.[43] Apparently, the argument is that little or none of these Effects will come to pass, so the tests discussed in *Benson v. State*, 2006 S.D 8, ¶ 46, 710 N.W.2d 131, 149 cannot be applied at this time. (Sounds scientific!)

In the face of their own spatial limits, Appellants digress to *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), wherein the Court, rejecting the federal takings claim of a disappointed zoning *applicant*, established a two-prong test of *special ripeness* for such claims for purposes of federal jurisdiction: *First*, has the planning body reached a final, reviewable decision (has a "regulation '[gone] too far' and is thus an invalid exercise of the police power," or is it "a 'taking' for which just compensation must be paid" (*Id.*, at 199), and *second*, has the property owner unsuccessfully availed itself of the compensatory process provided by state law? (*Id.*, at 195).

Years later, in *Knick v. Township of Scott*, 588 U.S. _____ (2019), the Court would overrule the second prong – the state-litigation requirement established in *Williamson County*. The first prong remains intact, however, as *Knick* concluded: "A property owner may bring a takings claim under § 1983 upon the taking of his property without just compensation by a local government." (*Id.*, at 23.) *Williamson County* concerned a zoning applicant, desiring to intensify

[43] Each home will receive *some* duration of Shadow Flicker; SDCL 43-13-2(8), which the PUC refuses to read or apply, does not create some *de minimus* rule, such as 30 hours annually.

a land use; Appellants here look only to *preserve their vested land uses*, without government-ordered interference, triggered by ambitious boundary lines and aggressive designs.

In *Knick*, the taking was a local ordinance requiring daytime access over private land to reach relict cemeteries. The word "easement" is never mentioned; yet, that is the effect of the ordinance. Here, the Agency did not pause at property lines, but headed right to the very homes of Appellants, in line with Stanton's standards, declaring that an affliction of Effects – *within limits, of course* – is right, proper and lawful. "Easement" is never mentioned - but that clearly is the intended effect of the PUC Permit, even as Applicant (Appellants would argue) is absolved also from nuisance claims *if* observing the parameters originating with Stanton's work.

This appeal is not in pursuit of the second prong formerly required by *Williamson County*. *That* case lies in the future, and likely in another venue. For now, as part of the viable first prong, Appellants seek relief in the Courts of this state, within the confines of appellate jurisdiction crafted by the Legislature, that the Board of Adjustment and the PUC, so eagerly embracing Stanton's notion for allocation of "Effects" upon mere neighbors, have each erred.

Granting of an affirmative easement is vested *exclusively* in Appellants. Whether drawing boundary lines and locations in pencil or by computer ("aggressively devised," as Staff witness Hessler observed), Applicant may certainly seek an easement (as with Appellant Kranz). Unwelcomed embraces cannot be compelled by governmental edict, absent taking intent. These bodies eagerly issue Permits, licensing *forever* an ensnarement of Appellants' homes and lands by Applicant's non-consensual grasp. This outcome seems fully consistent with Stanton's vision for governmental powers to facilitate wind farm placement,[44] but pays scant (if any) attention to the vested rights of Appellants under South Dakota property law.

[44] "Put It There!" - the interesting subtitle of Stanton's work seems ominous or threatening, with a comedic overtone, apt for a Project that, as Hessler opined, is "aggressively devised."

Respectfully submitted,

October 13, 2020

/s/ A.J. Swanson
A.J. Swanson – State Bar of South Dakota # 1680

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com
Attorney for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ

CERTIFICATE OF SERVICE

Undersigned, as counsel for Appellants in the above entitled matter, being an appeal from the administrative agency, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Docket EL19-027, and the decision of such agency made and served April 6, 2020, hereby certifies that on the date entered or printed below, a true copy of the APPELLANTS' REPLY BRIEF (with annexed Appendices A-1, A-2, A-3 and B through E, inclusive) has been electronically filed with the Clerk of Courts, Deuel County, through Odyssey File and Serve, Case 19CIV20-000021, *for further service upon counsel for Appellees, namely*:

Amanda M. Reiss, Special Assistant Attorney General:	amanda.reiss@state.sd.us
Kristen N. Edwards, Special Assistant Attorney General:	kristen.edwards@state.sd.us
Dana Van Beek Palmer, Lynn Jackson (Sioux Falls):	dpalmer@lynnjackson.com
Michael Nadolski, Lynn Jackson (Sioux Falls):	mnadolski@lynnjackson.com
Miles Schumacher, Lynn Jackson (Sioux Falls):	mschumacher@lynnjackson.com
Brian J. Murphy, NEXT ERA ENERGY (Juno Beach):	brian.j.murphy@nee.com

In addition, APPELLANTS' REPLY BRIEF is being served by electronic mail this date upon counsel for other intervenors in consolidated cases, namely:

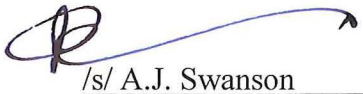
Shawn Tornow, Tornow Law Office (Sioux Falls):	rst.tlo@midconetwork.com

Finally, a scan of the signed APPELLANTS' REPLY BRIEF, with identified appendices in color, has been served also this date by electronic mail upon:

Honorable Dawn Elshere, Circuit Judge:	dawn.elshere@ujs.state.sd.us

Dated at Canton, South Dakota, this 13th day of October 2020.

Respectfully submitted,



/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com

Attorney for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ

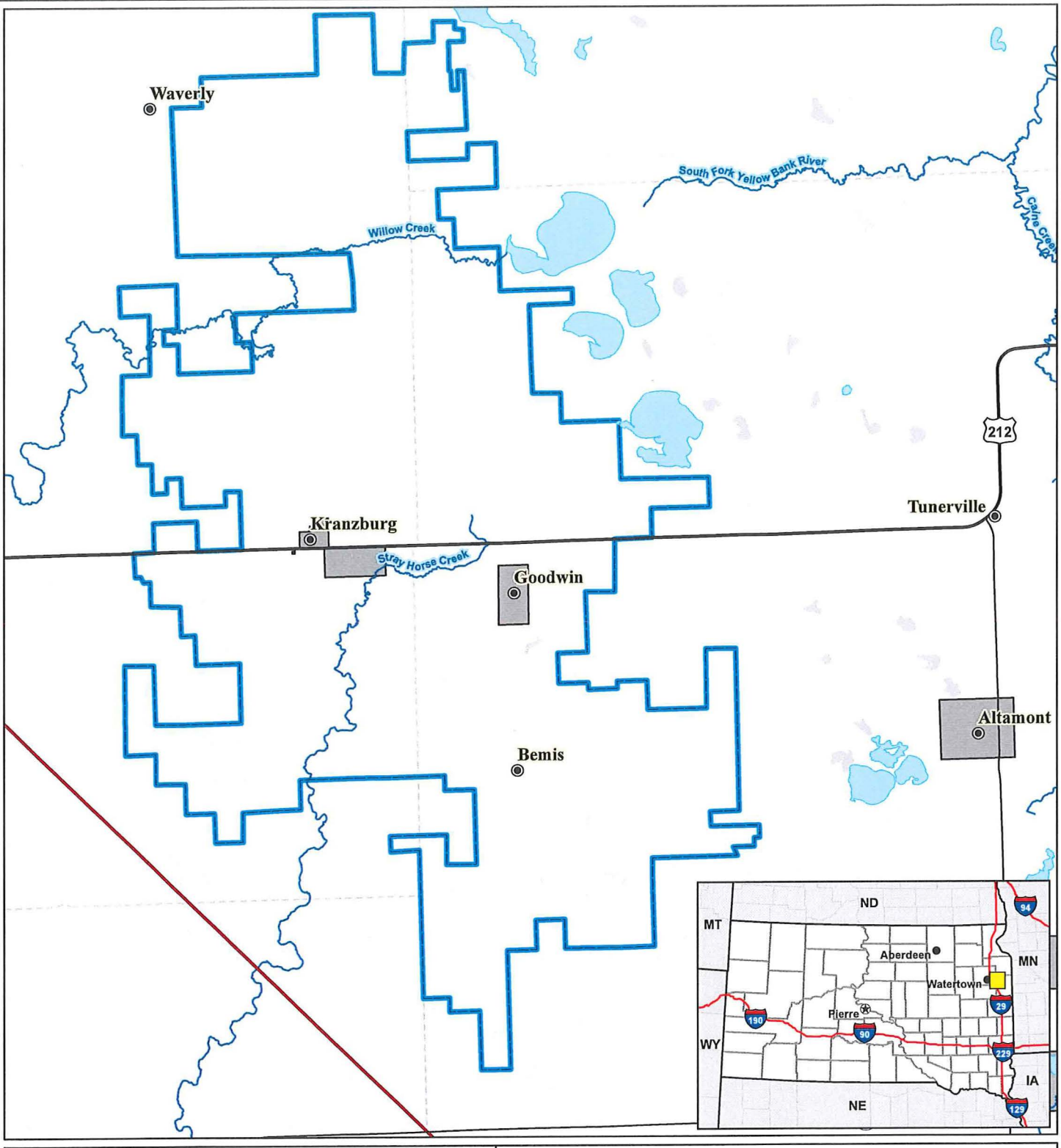


Figure 1. Project Area
Crowned Ridge II Wind Farm

- City
- Interstate Highway
- U.S. Highway
- State Highway
- River
- Waterbody
- Town Boundary
- Project Boundary

Kilometers
0 5 10

Miles
0 2.5 5

N W E S

Base Map: World Light Gray Canvas Base
Sources: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community
Codington, Deuel, and Grant Counties, South Dakota

NAD 1983 UTM Zone 14N

SWCA ENVIRONMENTAL CONSULTANTS

'Appendix A-1'

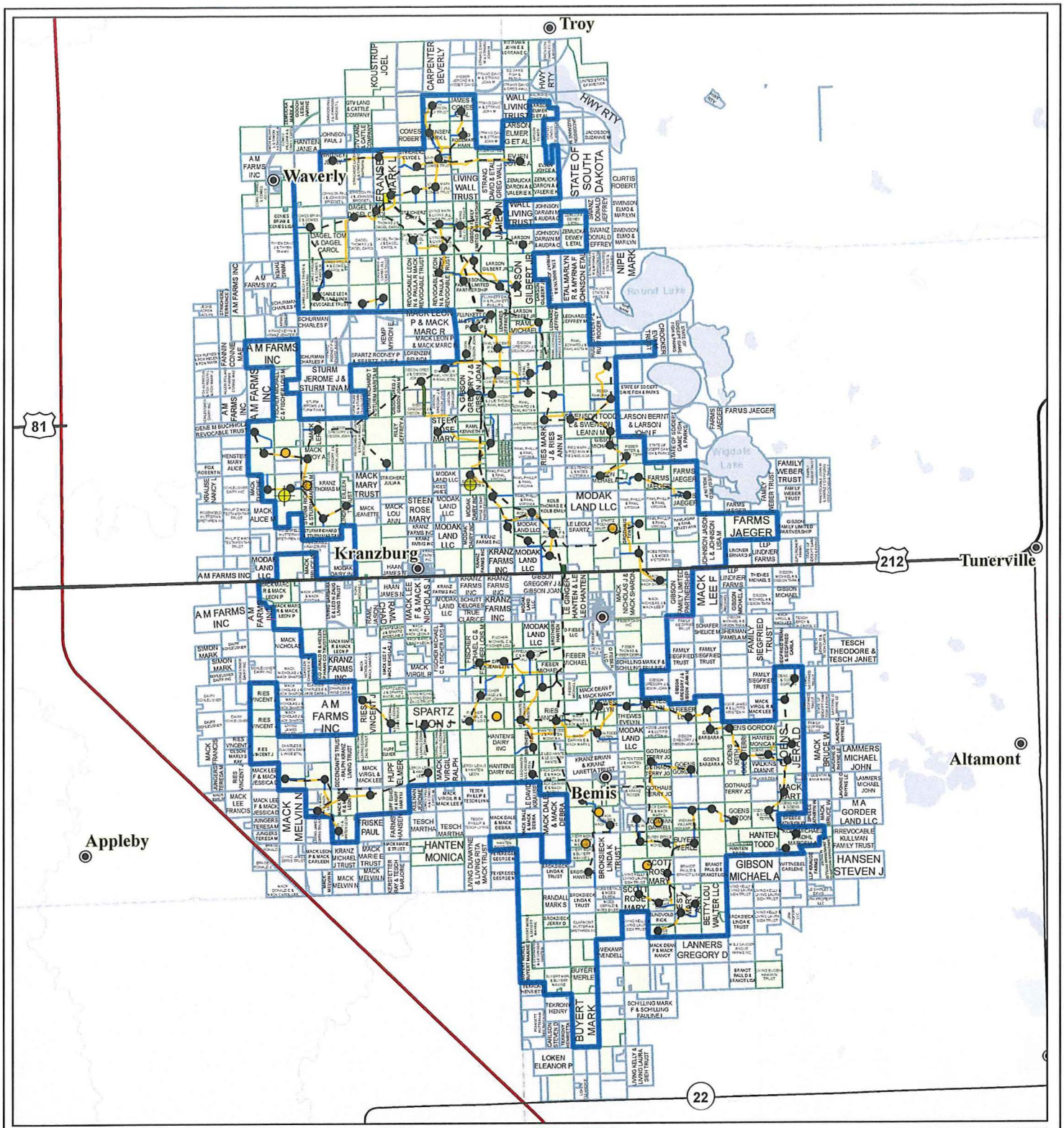


Figure 3a. Project Map

Crowned Ridge II Wind Farm

- MET Tower
- City
- Turbine
- Alternate Turbine Location
- Proposed Turbine Access Road
- Collection Line
- Crane Path
- Temporary Construction Easement (Needed for Construction)
- Interstate Highway
- U.S. Highway
- State Highway
- Substation
- O&M Facility
- Batch Plant
- Project Boundary

Lease Status

- Lease, Signed
- Pending Approval
- Parcel Boundary

Kilometers

0 2.5 5

Miles

0 2.5 5

N W E S

Base Map: World Light Gray Canvas Base
Sources: Esri, HERE, Garmin, © OpenStreetMap contributors, and the GIS user community
Codington, Deuel, and Grant Counties, South Dakota

Projection: NAD 1983 UTM Zone 14N

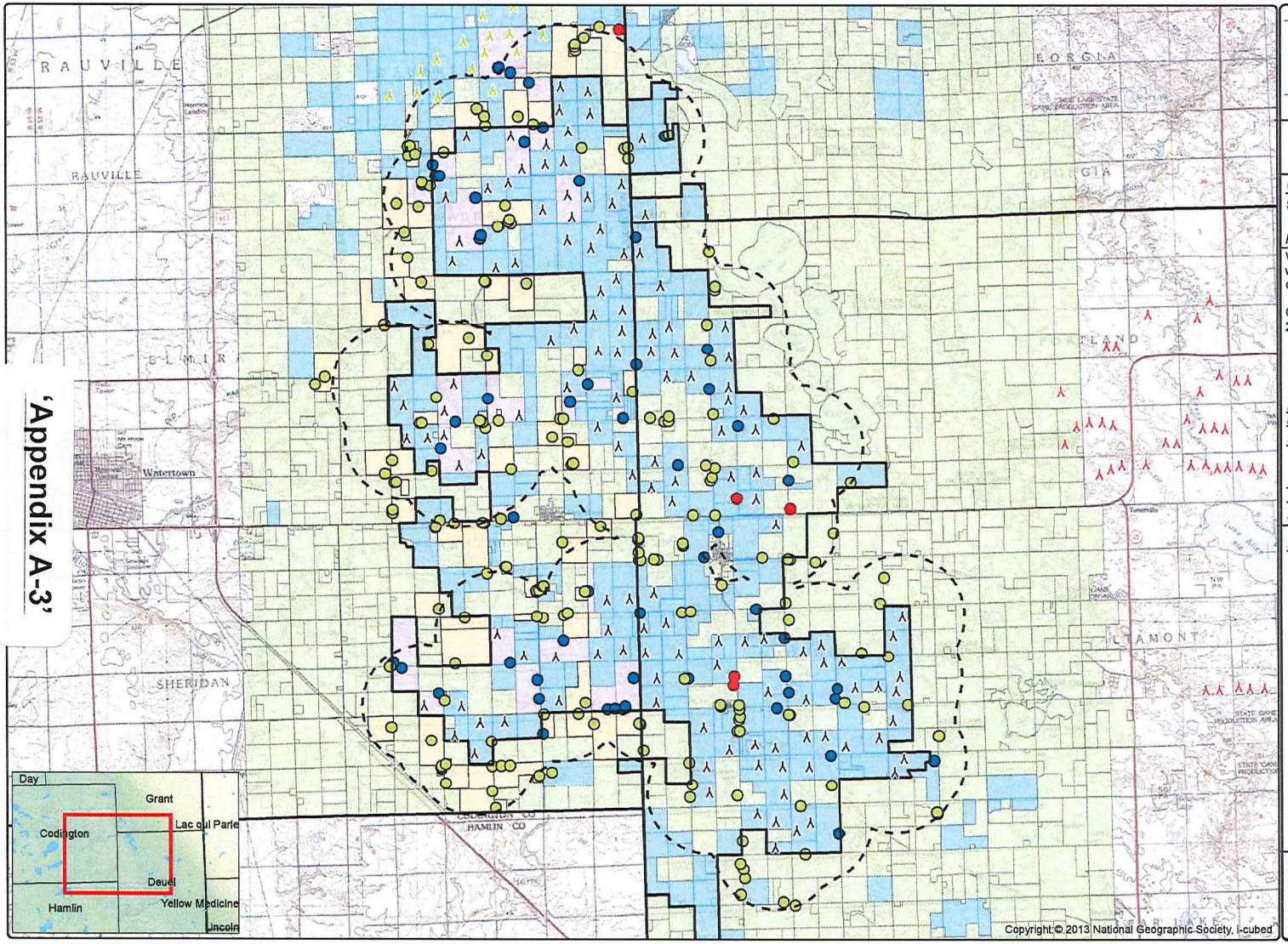
000184

SWCA ENVIRONMENTAL CONSULTANTS

'Appendix A-2'

EXHIBIT A14-2

'Appendix A-3'



0 0.75 1.5 3 Mile

EAPC WIND ENERGY

www.eapc.net | 701.775.3000

Crowned Ridge II Wind Farm
300 MW
Overview Map

Client
SWCA Environmental Consultants

Project Description
Wind turbine layout with land parcels within the project footprint and existing occupied strucures.

Codington County land parcels within 2 km of a wind turbine.

Location: Watertown, SD
Project #: 20174431

Issue Dates

#	Description	Date
1	Original	2019.09.18

Drawn By: AS *Checked By: JH*

Legend

- Crowned Ridge II Turbines
- Crowned Ridge Turbines
- Deuel Harvest Turbines
- 2 km Turbine Buffer
- County Lines
- CR II Project Boundary
- CR2 Intervenors
- Non-Participants Noise
- Participants Noise
- Non-Participating Codington Parcels
- Participating Codington_Parcels
- Non-Participating Parcels
- Participating Parcels

N W E S

011280

Table 2: Codington County property boundary cumulative realistic sound distribution

Realistic Sound (dBA)	Non-Participating Property Boundary	Participating Property Boundary
0 to 25	0	0
25 to 30	0	0
30 to 35	14	19
35 to 40	21	48
40 to 45	25	52
45 to 50	26	10
50+	0	11

Crowned Ridge II Deuel County Turbines

For Deuel County, the sound study indicates that the highest sound pressure level at the perimeter of a non-participating occupied structure is 44.7 dBA. Therefore, the project would be in compliance with Deuel County's allowable sound pressure levels as describes in Section 1215.03, paragraph 13 a.) of the current Deuel County Ordinance B2004-01-23B. Table 3 shows the distribution of sound pressure levels for the project. The maximum sound pressure level at the perimeter of a participating occupied structure is 47.4 dBA; however, there is no county ordinance for participating occupied structures. This information is provided for transparency.

Table 3: Deuel County occupied structure cumulative realistic sound distribution

Realistic Sound (dBA)	Non-Participating Occupied Structures	Participating Occupied Structures
0 to 25	0	0
25 to 30	0	0
30 to 35	6	0
35 to 40	23	4
40 to 45	53	10
45 to 50	0	7
+50	0	0

Crowned Ridge II Grant County Turbines

For Grant County, the sound study indicates that the highest sound pressure level at a distance of 25 feet from the perimeter of a non-participating occupied structure is

3100 Demers Avenue, Grand Forks, ND 58201 Ph: 701.775.3000 www.eapc.

The 102 shadow receptors were then modeled as greenhouse-mode receptors and the estimated shadow flicker was calculated for the array. No occupied structures are expected to experience more than 29 hours and 32 minutes of shadow flicker per year. Therefore, the Crowned Ridge II wind farm would be in compliance with Section 1215.03, paragraph 13 b.) of Deuel County Ordinance B2004-01-23B. Of the 102 occupied structures, the number that registered no shadow flicker hours was 32 (31.4%).

The maximum modeled expected shadow flicker at a participating receptor is 29 hours and 32 minutes and the maximum modeled expected shadow flicker at a non-participating receptor is 28 hours and 59 minutes. Table 3 contains the realistic shadow flicker distribution of the 102 occupied structures.

Table 3: Deuel County occupied structures cumulative realistic shadow flicker distribution.

Realistic Shadow Flicker (hrs/year)	Number of Non-Participating Occupied Structures	Number of Participating Occupied Structures
0	32	2
0 to 5	17	1
5 to 10	12	5
10 to 15	10	3
15 to 20	6	6
20 to 25	4	1
25 to 30	1	3
30+	0	0

Crowned Ridge II Grant County Turbines

For Grant County, 2 (1 participating and 1 non-participating) occupied structures within 2 kilometers of a wind turbine were found and analyzed. Standard resolution realistic shadow flicker maps were generated for the turbine array.

The 2 shadow receptors were then modeled as greenhouse-mode receptors and the estimated shadow flicker was calculated for the array. No occupied structures are expected to experience more than 8 hours and 56 minutes of shadow flicker per year. Therefore, the Crowned Ridge II wind farm would be in compliance with Section 1211.04 paragraph 14 of Grant County's Ordinance 2016-01C.

The maximum modeled expected shadow flicker at a participating receptor is 8 hours and 56 minutes and the maximum modeled expected shadow flicker at a non-participating

This Commission requires that this Applicant confirm having a site lease for each proposed turbine installation (such as the "Lease & Easement"). According to the application presented (Witness Tyler Wilhelm), that job is nearly complete, with about five or six sites left to be inked. What this Commission does *not* now require is that a similar document – in the nature of an "effects easement," along the lines of Section 5.2 – be in place with *each* non-participating landowner; even though the non-participating landowner is not hosting a turbine site, he or she is yet destined to receive various unpleasant attributes of being proximate to one or more sites. Needless to say, an "effects easement" would place the adjacent or nearby landowner in privity with Applicant as to the unpleasantness of wind farm proximity – the easement granted, however, would respond to the servitude sought to be imposed by Applicant.

Two points now bear further mention and consideration by this Commission: – *first*, what does the Applicant deem important (and appropriate) when dealing with "participating landowners," and, *second,* what, if anything, does state law provide as to the land-based rights of "non-participating landowners" who must continue to live in or near a wind farm?

As to the first point, Section 5.2 of the Lease & Easement speaks for itself – the "Operator" proposes to extract from the proposed "participating landowner" a rather sweeping exoneration from the adverse "effects" of attempting to live a human life too close or proximate to operating wind turbines – whether such "effects" are flowing from turbines on the leased land, or from other sites nearby. Is not this Section 5.2 *exactly* the same easement form now being deployed, with some success, by this Applicant? (Does this Commission know for certain?)

As to the second point, these Intervenors have the unqualified right to protect the interests in their lands (SDCL § 43-2-1), including control as to who – if anyone – may lay a servitude upon their lands. SDCL § 43-13-4 provides: "A servitude can be created only by one who has a vested estate in the servient tenement." This definition is *not* construed expansively so as to potentially embrace as a "creator," for example, Deuel County Board of Adjustment (in approving a CUP that results in the casting of shadow flicker on non-participating properties), or the Deuel County Board (when crafting a zoning ordinance that purports to adversely permit such casting), or even this Commission (whenever issuing a facility siting permit that likewise blesses what the County's Board of Adjustment has done adversely over the protests of non-participating landowners). The concept of "creator" also does not embrace NARUC, US DOE, or even the Applicant itself, who now appears before this Commission for permission, in the form of a Facility Siting Permit, to cast and dump the operational products and hazards of 132 proposed turbines, over the fence and onto non-participating landowners.

Lacking the power to create a servitude upon and over the lands and over the residential properties of Intervenors for Applicant's benefit (a privilege belonging exclusively to Intervenors), this Commission is now asked nevertheless to provide a *de facto* easement upon and over the lands of Intervenors. This easement would be in favor of those having interests in nearby lands, sites being also possessed by the Applicant (under instruments thought similar to the "Lease & Easement," with Section 5.2 as previously quoted). SDCL § 43-13-2 defines an easement as including, *inter alia*, "[t]he right of transacting business upon land" (if establishing a collection of 132 wind turbines upon a broad scope of the landscape, including lands close enough to emit sound, LFN, and shadow flicker upon the homes and properties of Intervenors, by virtue of a facility siting permit, isn't a "right of transacting business upon land," then what is

III. Guidelines for Implementing Wind-Park Siting and Zoning Criteria and Setback Distances

This part of the report reviews the many criteria that are addressed in wind-park siting and zoning, and provides guidelines based on the best available information about each criterion. As already mentioned (see p. 2), best practices are subject to refinement over time, as more knowledge is gained and as wind generator technologies change and improve. Table 6 summarizes the recommendations included in Part III.

Table 6: Wind-Park Siting and Zoning Criteria, Recommended Approaches and Setback Distances

Criterion	Recommended approach
Noise, sound, and infrasound	• Noise standards should allow some flexibility. • Noise standards should vary depending on the area's existing and expected land uses, taking into account the noise sensitivity of different areas (e.g., agricultural, commercial, industrial, residential). • Determine pre-construction compliance using turbine manufacturer's data and best available sound modeling practices. • Apply a planning guideline of 40 dBA as an ideal design goal and 45 dBA as an appropriate regulatory limit (following Hessler's proposed approach, 2011). • Allow participating land owners to waive noise limits. • Establish required procedures for complaint handling. • Identify circumstances that will trigger, and techniques to be used for: (a) mandatory sound monitoring; (b) arbitration; and (c) mitigation. • Do not regulate setback distance; regulate sound.
Shadow flicker	• Restrict to not more than 30 hours per year or 30 minutes per day at occupied buildings. • Allow participating land owners to waive shadow-flicker limits. • Allow the use of operational practices and mitigation options for compliance. • Do not regulate setback distance; regulate the duration of shadow flicker.
Ice throw	• Authorize demonstrated ice control measures. • Require wind park to provide insurance and escrow funds to ensure compensation for proven damages resulting from ice throw. • Do not regulate setback distance; regulate ice throw.
Wildlife and habitat exclusion zones	• Responsible wildlife protection agencies should use the best available scientific knowledge and data to determine exclusion and avoidance zones and appropriate buffers (that is, setback distances) beyond those zones. • Permits should specify required pre-, during-, and post-construction monitoring. • Permits should specify how mitigation requirements will be determined and what mitigation techniques will be considered. • Regulate setback distances as required by responsible wildlife protection agencies and do not authorize siting in exclusion and buffer zones.
Aesthetic requirements	• Require neutral paint color and minimal signage. • Require the minimum of nighttime lighting necessary to achieve FAA compliance. • Require that realistic visual impact assessments, accessible to the public, be included in wind park planning and applications. • Manage visual impact through setbacks and exclusions from critical competing land uses.

'Appendix E'