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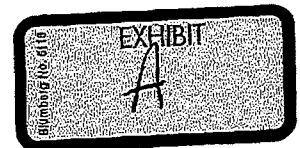
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Grant County Compiled Zoning Ordinances

01/25/2018

Appendix:



008727

10. Abandoned Turbines. The permittees shall advise the County of any turbines that are abandoned prior to termination of operation of the WES. The County may require the permittees to decommission any abandoned turbine.

11. Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.

12. Towers.

a. Color and Finish. The finish of the exterior surface shall be non-reflective and non-glass.

b. All towers shall be singular tubular design

13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity. [Ord. 2004-1, Rev. 2004-1G]

13. Permit Expiration. The permit shall become void if no substantial construction has been completed within two (2) years of issuance.

14. Required Information for Permit. [Ord. 2004-1, Rev. 2004-1G]

a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.

b. Map of easements for WES.

c. Affidavit attesting that necessary easement agreements with landowners have been obtained.

d. Map of occupied residential structures, businesses, churches and buildings owned and/or maintained by a governmental entity.

e. Preliminary map of sites for WES, access roads and collector and feeder lines. Final map of sites for WES, access roads and utility lines to be submitted sixty (60) days prior to construction.

f. Proof of right-of-way easement for access to utility transmission lines and/or utility interconnection.

g. Location of other WES in general area.

h. Project-specific environmental concerns (e.g. native habitat, rare species, and migratory routes). This information shall be obtained by consulting with state and federal wildlife agencies. Evidence of such consultation shall be included in the application.

i. Final haul road agreements to be submitted sixty (60) days prior to construction.

AN ORDINANCE AMENDING GRANT COUNTY ORDINANCE #2004-1, AN ORDINANCE ESTABLISHING ZONING REGULATIONS FOR GRANT COUNTY, SOUTH DAKOTA, AND PROVIDING FOR THE ADMINISTRATION, ENFORCEMENT, AND AMENDMENT THEREOF, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTERS 11-2, 1967 SDCL, AND AMENDMENTS THEREOF, AND FOR THE REPEAL OF ALL RESOLUTIONS AND ORDINANCES IN CONFLICT THEREWITH

WHEREAS, the Grant County, South Dakota, Board of County Commissioners, hereinafter referred to as the Board of County Commissioners, deems it necessary, for the purpose of promoting the health, safety, and the general welfare of the County, to enact zoning regulations and to provide for its administration, and

WHEREAS, the Board of County Commissioners has appointed a County Planning Commission, hereinafter referred to as the Planning Commission, to recommend the district boundaries and to recommend appropriate regulations to be enforced therein, and

WHEREAS, the Planning Commission has divided Grant County into districts, and has established by reference to maps the boundaries of said districts for administration and interpretation; has provided for definitions and for amendments to this Ordinance; has provided for the enforcement; prescribed penalties for violation of provisions; has provided for building permits within the districts; has provided for invalidity of a part and for repeal of regulations in conflict herewith; and has prepared regulations pertaining to such districts in accordance with the county comprehensive plan and with the purpose to protect the tax base, to guide the physical development of the county, to encourage the distribution of population or mode of land utilization that will facilitate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements, to conserve and develop natural resources, and

WHEREAS, the Planning Commission has given reasonable consideration, among other things, to the character of the districts and their peculiar suitability for particular uses, and

WHEREAS, the Planning Commission and Board of County Commissioners has given due public notice to a hearing relating to zoning districts, regulations, and restrictions, and has held such public hearings, and

WHEREAS, all requirements of SDCL 11-2, with regard to the preparation of these regulations and subsequent action of the Board of County Commissioners, has been met, and

WHEREAS, copies of said zoning regulations have been filed with the Grant County Auditor for public inspection and review during regular business hours, and

WHEREAS, all ordinances, or parts of regulations in conflict herewith are hereby expressly repealed;

THEREFORE BE IT ORDAINED that Ordinance 2016-01C is hereby adopted by the Board of County Commissioners, Grant County, South Dakota.

Voting aye: Commissioners Buttke, Dummann, Mach, Stengel

Voting nay: Commissioner Street

Adopted this 28th day of December, 2018.

Martin Buttke
Chairperson
Grant County Board of County Commissioners

ATTEST:
[Signature]
Grant County Auditor

This ordinance shall become effective 20 days after publication of this notice in the official newspaper, thereby repealing all ordinances or parts thereof in conflict herewith unless a referendum in a timely manner is file.

First Reading: December 18, 2018
Second Reading: December 28, 2018
Adopted: December 28, 2018
Published: January 9, 2019
Effective: January 28, 2019

Published once for an approximate cost of _____.

Appendix A-2

e. Failure to Decommission. If the WES facility owner or operator does not complete decommissioning, the Board may take such action as may be necessary to complete decommissioning, including requiring forfeiture of the bond. The entry into a participating landowner agreement shall constitute agreement and consent of the parties to the agreement, their respective heirs, successors, and assigns, that the Board may take such action as may be necessary to decommission a WES facility.

~~10-11~~ Abandoned Turbines. The permittees shall advise the County of any turbines that are abandoned prior to termination of operation of the WES. The County may require the permittees to decommission any abandoned turbine.

~~11-12~~ Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.

~~12-13~~ Towers.

- a. Color and Finish. The finish of the exterior surface shall be non-reflective and non-glass.
- b. All towers shall be singular tubular design.

~~13-14~~ Noise. Noise level shall not exceed 50 ~~45~~ dBA, average A-weighted Sound pressure including constructive interference effects, measured twenty-five (25) feet from at the perimeter of the principal and accessory structures of existing off-site ~~non-participating~~ residences, businesses, and buildings owned and/or maintained by a governmental entity.

Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

Noise level measurements shall be made with a sound level meter using the A-weighting scale, in accordance with standards promulgated by the American National Standards Institute. A L90 measurement shall be used and have a measurement period no less than ten (10) minutes unless otherwise specified by the Board of Adjustment.

~~14-15~~ Permit Expiration. The permit shall become void if no substantial construction has been completed commenced within ~~two (2)~~ three (3) years of issuance; or if a State Permit from the South Dakota Public Utility Commission has not been issued within two (2) years of issuance of the permit.

~~15-16~~ Required Information for Permit.

- a. Boundaries of the site proposed for WES and associated facilities on United States Geological Survey Map or other map as appropriate.
- b. Map of easements for WES.
- c. Affidavit attesting that necessary easement agreements with landowners have been obtained.

Appendix A-3

003214

500 East Capitol Avenue | Pierre, SD 57501 P605.773.3361 F605.773.6623



December 5, 2019

RECEIVED

DEC 06 2019

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

South Dakota Public Utilities Commission
ATTN: Amanda Reiss
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501

RE: PUC Docket EL19-027-Crowned Ridge Wind II

Dear Attorney Reiss:

The South Dakota Department of Health has been requested to comment on the potential health impacts associated with wind facilities. Consistent with our prior statement and based on the studies we have reviewed to date, the South Dakota Department of Health has not taken a formal position on the issue of wind turbines and human health. A number of state public health agencies have studied the issue, including the Massachusetts Department of Public Health¹ and the Minnesota Department of Health². These studies generally conclude that there is insufficient evidence to establish a significant risk to human health. Annoyance and quality of life are the most common complaints associated with wind turbines, and the studies indicate that those issues may be minimized by incorporating best practices into the planning guidelines.

Sincerely,

Kim Malsam-Rysdon

Kim Malsam-Rysdon
Secretary of Health

1. <http://www.mass.gov/eea/docs/dep/energy/wind/turbine-impact-study.pdf>
2. www.health.state.mn.us/divs/eh/hazardous/topics/windturbines.pdf

Appendix :



007357

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF DEUEL)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

IN THE MATTER OF
ADMINISTRATIVE APPEAL GARRY
EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL AND LARETTA KRANZ

and

AMBER KAYE CHRISTENSON AND
ALLEN ROBISH,

Appellants,

v.

CROWNED RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION,

Appellees.

19CIV20-000021, and
19CIV20-000027

**NOTICE OF ENTRY
OF ORDER**

NOTICE IS HEREBY GIVEN that on March 12, 2021, the Honorable Dawn Elshere, Circuit Court Judge of the Third Judicial Circuit, signed an Order affirming the Decision and Order of the South Dakota Public Utilities Commission, which Order was entered and filed on March 12, 2021. Attached hereto and served herewith is a true and correct copy of said Order.

Dated this 15th day of March, 2021.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.



Miles F. Schumacher

Dana Van Beek Palmer

Attorneys for Defendants

110 N. Minnesota Avenue, Suite 400

Sioux Falls, SD 57104

Telephone: (605)332-5999

mschumacher@lynnjackson.com

dpalmer@lynnjackson.com

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the **Notice of Entry of Order** affirming the Decision and Order of the South Dakota Public Utilities Commission were served electronically to the Parties listed below, on the 15th day of March, 2021, through the Odyssey file and serve system:

Mr. A.J. Swanson
Arvid J. Swanson, P.C.
27452 482nd Ave.
Canton, SD 57013
aj@ajswanson.com

Mr. R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
rst.tlo@midconetwork.com

Amanda Reiss
Kristen N. Edwards
SD Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501
amanda.reiss@state.sd.us
kristen.edwards@state.sd.us

Dated this 15th day of March, 2021.



Miles F. Schumacher

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF DEUEL)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

IN THE MATTER OF
ADMINISTRATIVE APPEAL GARRY
EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL AND LARETTA KRANZ

19CIV20-000021, and
19CIV20-000027

and

AMBER KAYE CHRISTENSON AND
ALLEN ROBISH,

Appellants,

ORDER

v.

CROWNED RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION,

Appellees.

Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz having appealed from the South Dakota Public Utilities Commission's Final Decision and Order Granting Permit to Construct Facility in EL 19-027, and Appellants Amber Christenson and Allen Robish having separately appealed as a part of their separate issues in both Codington County and Grant County, and with the appeals being thereafter combined for purposes of judicial economy, and with all parties having appeared by and through their respective counsel of record, and the Court having considered the Briefs submitted by all parties as well as all arguments of counsel, and the Court having

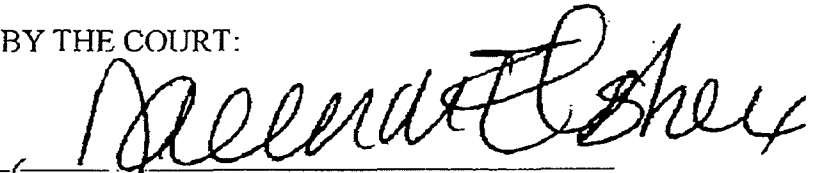
issued its Memorandum Opinion on February 26, 2021, which is attached as Exhibit A and incorporated herein by this reference, it is hereby,

ORDERED, ADJUDGED and DECREED that the Decision and Order of the South Dakota Public Utilities Commission, entered April 6, 2020, is affirmed.

Dated this ____ day of March, 2021.

Signed: 3/12/2021 10:56:19 AM

BY THE COURT:



Honorable Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

Attest:
Reichling, Sandy
Clerk/Deputy



STATE OF SOUTH DAKOTA)
 :SS
COUNT OF DEUEL)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

IN THE MATTER OF
ADMINISTRATIVE APPEAL GARRY
EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL,
AMY RALL, AND LARETTA KRANZ

And

19CIV20-21 and 20-27

AMBER KAYE CHRISTENSON AND
ALLEN ROBISH,

MEMORANDUM OPINION

Appellants,

Vs.

CROWN RIDGE WIND, LLC AND
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION,

Appellees

INTRODUCTION

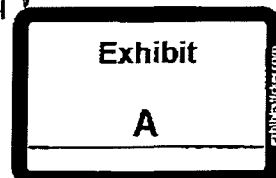
This matter comes before the circuit court on appeal by Appellants Amber Christenson and Allen Robish (collectively "Christenson Appellants")¹, Appellants Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz (collectively "Ehlebracht Appellants")², appealing the South Dakota Public Utilities Commission Staff's (the "Commission's" or "Staff's") Final Decision and Order Granting Permit to Construct Facility in EL 19-027 dated April 6, 2020. (AR 14230-14258), Final Decision and Order Granting Permit to Construct Facility, Permit Conditions, Notice of Entry (Permit)).³

¹ Christenson Appellants – 19CIV20-27

² Ehlebracht Appellants – 19CIV20-21.

³ All citations to the administrative record are referenced as "AR".

Appx. C-6



STATEMENT OF JURISDICTION

The Christenson Appellants appeal from Commission's April 6, 2020, Final Decision and Order Granting Permit to Construct Facility; Permit Conditions; and Notice of Entry as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants each timely and properly filed their respective Notice of Appeals on May 1, 2020, and May 5, 2020, in both Codington and Grant Counties, South Dakota. Thereafter, following Commission's unopposed motion to change venue (May 11, 2020), the circuit court entered its Order changing venue herein (May 19, 2020), pursuant to SDCL § 1-26-31.1. This Court ordered that the Intervenor's files would be thereafter combined into this appellate file, 19CIV20-27.

The Ehlebracht Appellants appeal from the same April 6, 2020, Final Decision and Order, as related to its issuance of a wind energy facility permit to CRWII, pursuant to SDCL § 1-26-30, as provided for by SDCL § 49-41B-30. Appellants timely and filed their Notice of Appeal on April 29, 2020, in Deuel County, South Dakota.

STATEMENT OF FACTS

On July 9, 2019, Crowned Ridge Wind II, LLC⁴ ("Applicant", "Crowned Ridge", or "CRWII") submitted its application for a facility permit for a 300.6-megawatt (MW) wind energy facility to consist of up to 132 wind turbines in Deuel, Grant, and Codington counties (the "Project").⁵ (AR 14230-14258). Within its application, CRWII submitted written testimony from six witnesses.⁶ (AR 1-1118, 3233-3254). The commercial operation date of the Project was estimated to be in the fourth quarter of 2020. (AR 11).

On July 11, 2019, the Staff issued the Notice of Application; Order for and Notice of Public Input Hearing; and a Notice for Opportunity to Apply for Party Status and established an intervention deadline of September 9, 2019. (AR 1122-1123).

On July 31, 2019, the Commission issued an order granting party status as Intervenor to the Christenson Appellants. (AR 1193-1194). On August 26, 2019, the Commission issued an order granting party status as Intervenor to the Ehlebracht Appellants. (AR 1478). On that same

⁴ CRWII is a wholly-owned, indirect subsidiary of NextEra Energy Resources, LLC.

⁵ Besides the turbines, the Project also includes access roads to the turbines and associated facilities, underground 34.5 kV electrical collector lines, underground fiber-optic cable, a 34.5-kV to 230 kV collection substations, two permanent meteorological towers, and an operations and maintenance facility.

⁶ Jay Haley, Sarah Sappington, Mark Thompson, Tyler Wilhelm, Daryl Hart, and Richard Lampeter.

day, pursuant to SDCL §§ 49-41B-15 and 49-41B-16, the Commission held the public input meeting in Watertown, South Dakota. (AR 1122-1123, 1274-1477).

On September 20, 2019, CRWII submitted pre-filed Supplemental Testimonies and Exhibits.⁷ (AR 2007-3223). On October 21, 2019, CRWII filed Corrected Direct Testimony of Witness Sarah Sappington. (AR 3233-3254). On December 9, 2019, Staff filed Pre-Filed Direct Testimony and Exhibits of five witnesses.⁸ (AR 3356-4259). On December 12, 2019, several Ehlebracht Appellants⁹ each filed Pre-Filed Direct Testimony in the form of Affidavits. (AR 4251-4264). On January 8, 2020, CRWII submitted Pre-Filed Rebuttal Testimony and Exhibits of seven witnesses¹⁰ (with corrections filed on January 22, 2020, and January 24, 2020). (AR 4267-4338). On January 23, 2020, Staff submitted Pre-Filed Supplemental Testimony of David Lawrence. (AR 7054-7079).

On February 4-6, 2020, the Commission held an evidentiary hearing in Pierre, South Dakota. (AR 8844-13781). CRWII, Staff, and Appellants participated in the evidentiary hearing, presenting testimony, and cross-examining witnesses.¹¹ (AR 8844-13781). Appellants presented witness testimony,¹² but did not pre-file expert testimony. The Hearing Examiner presided over the hearing and each of the commissioners were present for the entirety of the hearing. On February 27 and March 2, 2020, the Parties filed Post-Hearing Briefs. (AR 13820-13919).

On March 17, 2020, the Commission met to consider whether to issue a facility permit for the Project. (AR 13984-14079). At the meeting, the Commission voted unanimously to issue a permit for the Project, subject to 49 conditions. (AR 13994-14079). On April 6, 2020, the Commission issued the Permit. (AR 14230-14258). The Permit includes conditions establishing maximum permissible sound levels and maximum levels of shadow flicker at residences near the Project.¹³ (AR 14246-14258).

⁷ These include Mark Thompson, Jay Haley, Tyler Wilhelm, Dr. Cristopher Ollson, Daryl Hart, Sarah Sappington, Michael MaRous, and Dr. Robert McCunney.

⁸ These include David Hessler, Darren Kearney, Hilary Meyer Morey, David Lawrence, and Paige Olson.

⁹ Amy Rall, Laretta Kranz, Garry Ehlebracht, and Steven Greber.

¹⁰ These include Mark Thompson, Jay Haley, Tyler Wilhelm, Richard Lampeter, Sarah Sappington, Michael MaRous, and Dr. Christopher Ollson.

¹¹ Seventeen witnesses testified at this hearing.

¹² On December 12, 2019, Garry Ehlebracht, Steven Greber, Amy Rall, and Laretta Kranz submitted pre-filed direct testimony.

¹³ Specifically, Permit Condition 26 limits sound levels emitted from the Project to 45 dBA for non-participating residences and 50 dBA for participating residences, as measured within 25 feet of a residence, with an allowance for a landowner to waive the condition. (AR 14251). Permit Condition 35 restricts Shadow Flicker at residences to 30 hours per year, with an allowance for an owner to waive the condition. (AR 14255).

On April 29, 2020, the Ehlebracht Appellants filed a Notice of Appeal of the Order in the Third Circuit Court located in Deuel County followed by a Statement of Issues on May 7, 2020. On May 1, 2020, the Christenson Appellants filed a Notice of Appeal followed by a Statement of Issues on May 11, 2020. With the consent of the parties, the appeals were consolidated in the Third Circuit Court in Deuel County.

On July 13, 2020, Ehlebracht Appellants filed their initial brief. On August 10, 2020, Christenson Appellants filed their initial brief. On September 11, 2020, Staff filed its Response Brief to Christenson Appellants. ("Staff's Brief to Christenson"). On September 23, 2020, CRWII submitted its Response Brief to both Christenson and Ehlebracht Appellants ("CRWII's Brief"). On September 24, 2020, Staff filed its Response Brief to Ehlebracht Appellants. ("Staff's Brief to Ehlebracht"). On October 8, 2020, Christenson Appellants submitted their Reply Brief to both Staff and CRWII. On October 13, 2020, Ehlebracht Appellants submitted their Reply Brief. On November 23, 2020, a hearing was held on the matter in Deuel County, South Dakota

STANDARD OF REVIEW

The regulatory agency here, the Public Utilities Commission, is governed by the Administrative Rules of South Dakota ("ARSD"), specifically ARSD Chapter 20:10:22 ("Energy Facility Siting Rules"). Decisions by the Commission may be appealed to the circuit court:

Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.¹⁴

SDCL § 49-41B-30. Subsequently, SD Ch. 1-26 states the following review procedures:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;

¹⁴ "The sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." SDCL § 1-26-32.1; *see also* SDCL § 15-6-81(c) ("SDCL Ch. 15-6 does not supersede the provisions of statutes relating to appeal to the circuit courts.").

- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . .

SDCL § 1-26-36; see also *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602.

The agency's factual findings are reviewed under the clearly erroneous standard. *Id.* (citing SDCL § 1-26-36(5)). A decision is clearly erroneous if, after reviewing the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Steinmetz v. State, DOC Star Academy*, 2008 S.D. 87, ¶ 6, 756 N.W.2d 392, 395 (internal citations omitted). It is well-settled that a court will not weigh the evidence or substitute its judgment for that of the Commission, rather, it is the court's function to determine whether there was any substantial evidence in support of the Commission's conclusion or finding. See, e.g., *Application of Svoboda*, 54 N.W.2d 325, 327 (S.D. 1952) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)).

Regarding questions of fact, the court affords great weight to the findings made and inferences drawn by an agency. See SDCL § 1-26-36. The agency's decision may be affirmed or remanded but cannot be reversed or modified absent a showing of prejudice. *Anderson*, 2019 S.D. 11, ¶ 10, 924 N.W.2d at 149 (citing SDCL § 1-26-36) (emphasis added). Even if the court finds the Commission abused its discretion, the Commission's decision may not be overturned unless the court also concludes that the abuse of discretion had prejudicial effect.¹⁵ *Sorensen*, 2015 S.D. 88, ¶ 20, 871 N.W.2d at 856 (emphasis added).

Questions of law are reviewed de novo on appeal from an administrative agency's decision. *Anderson v. South Dakota Retirement System*, 2019 S.D. 11, ¶ 10, 924 N.W.2d 146, 149 (citing *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548) (emphasis added). Matters of reviewable discretion are reviewed for abuse. *Id.* (citing SDCL § 1-

¹⁵ A reviewing court will reverse an administrative agency decision when the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law, are clearly erroneous in light of the entire evidence in the record, or are arbitrary and capricious, or are characterized by abuse of discretion, or are clearly an unwarranted exercise of discretion. SDCL § 1-26-36; *In re One-time Special Underground Assessment by Northern States Power Company in Sioux Falls*, 2001 S.D. 63, ¶ 8, 628 N.W.2d 332, 334. See also *Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 16, 721 N.W.2d 461, 466; *Apland v. Butte County*, 2006 S.D. 53, ¶ 14, 716 N.W.2d 787, 791.

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26-36(6)) (emphasis added). “An agency’s action is arbitrary, capricious or an abuse of discretion only when it is unsupported by substantial evidence and is unreasonable and arbitrary.” *In re Midwest Motor Express*, 431 N.W.2d 160, 162 (S.D. 1988) (citing *Application of Dakota Transportation of Sioux Falls*, 291 N.W. 589 (S.D. 1940)) (emphasis added); see also *Sorensen v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 20, 871 N.W.2d 851, 856 (“An abuse of discretion ‘is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’”) (internal quotation omitted)). “Substantial evidence” is defined as “such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion.” SDCL § 1-26-1(9).

Here, Appellants challenge the agency’s conclusion that the CRWII wind facility will not harm the social and economic condition of inhabitants in the wind energy facility siting area and that the facility will not substantially impair the health, safety, or welfare of the inhabitants within the siting area as clearly erroneous based upon the record in its entirety.¹⁶ This presents a mixed question of fact and law, reviewable de novo. *Johnson v. Light*, 2006 S.D. 88, ¶ 10, 723 N.W.2d 125, 127 (“Mixed questions of law and fact that require the reviewing Court to apply a legal standard are reviewable de novo.”) (quoting *State ex rel. Bennett v. Peterson*, 2003 S.D. 16, ¶ 13, 657 N.W.2d 698, 701)).

PART I: CHRISTENSON APPELLANTS

Burden of Proof

South Dakota law requires the following:

The applicant has the burden of proof to establish by a preponderance of the evidence that:

- (1) The proposed facility will comply with all applicable laws and rules; [and]
- ...
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants. . . .

SDCL § 49-41B-22. Furthermore, the ARSD also places the burden upon the applicant:

In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant,

¹⁶ An applicant for a permit is required to establish that the facility “will not substantially impair the health, safety or welfare of the inhabitants” in accordance with SDCL § 49-41B-22(3).

Appx. C-11

applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 (“Burden in contested case proceeding”).

Christenson Appellants assert that the PUC’s findings of fact were clearly erroneous, and its corresponding conclusions of law amounted to reversible error under SDCL § 1-26-36, in part, since Applicant failed to meet its burden of proof and/or its burden of going forward as required by SDCL § 49-41B-22 and/or ARSD 20:10:01:15.01. Under this burden of proof issue, the Christenson appellants assert several issues where the burden of proof failed. The court will address them below.

Solid Waste

Christenson Appellants initially raised the issue of “solid or radioactive waste” in their first brief. Christenson Brief, at 9-11. However, as Appellees PUC and CRWII argued in their responsive briefs, Christenson argued the wrong ARSD, as that did not apply to wind energy facilities, such as this Project.¹⁷ The applicable ARSD in this case is the following:

The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

- (1) A forecast of the impact on commercial and industrial sectors, . . . solid waste management facilities, . . . and other community and government facilities or services. . .

ARSD 20:10:22:23 (“Community impact”). Christenson acknowledges the previous error, and then argues this “community impact” regulation in their reply brief. Christenson Reply Brief, at 2-4. Although the incorrect statute was cited, the issue of “solid waste” was argued initially.

¹⁷ Christenson initially argued that CRWII did not comply with ARSD 20:10:22:31, which states “The applicant shall provide information concerning the generation, treatment, storage, transport, and disposal of solid or radioactive waste generated by the proposed facility and evidence that all disposal of the waste will comply with the standards and regulations of any federal or state agency having jurisdiction. . . .” However, as PUC argued, ARSD 20:10:22:05 states that ARSD 20:10:22:26 to 20:10:22:33, inclusive, apply for a permit for an *energy conversion* facility. See SDCL § 49-41B-2(6) for the definition of an energy conversion facility. Rather, this regulation states that ARSD 20:10:22:33.01 and 20:10:22:33.02 apply for a permit for a *wind energy* facility.

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Christenson's argument concentrates upon the issue of identifying, analyzing, and forecasting the end of life disposal of the Project's used blades, concrete, and other refuse. The Staff states that the Commission heard evidence on the future disposal of wind turbine blades and received assurance from CRWII that it would comply with the applicable laws for disposal, which could occur decades into the future. CRWII stated at the November 2020 hearing that the statute is limited to the construction, operation, and maintenance of the facility, and that there is nothing in it regarding the decommissioning or tearing down.

Appellees' arguments are more persuasive here. First, the testimonies provided repeated assurances that the Project would follow the applicable laws. Furthermore, in the Application, this ARSD was specifically addressed, and stated in part, "Construction and operation of the Project . . . is not anticipated to have significant short- or long-term effects on . . . solid waste management facilities." Ex. A1, page 93.

Second, the argument of "disposal" here appears moot. While the incorrect, previously cited ARSD 20:10:22:31 requires proper disposal, the correct, applicable ARSD 20:10:22:23 does not mention the words "disposal" or "decommissioning" at all. It specifically refers to a facility's "construction, operation, and maintenance." Christenson's argument here concerns the *end of life* of the Project, and not the *construction, operation, and maintenance* of the Project. This ARSD does not require specific plans for the *disposal* of blades and refuse; therefore, the Commission did not violate SDCL § 49-41B-22, ARSD 20:10:01:15.01, or ARSD 20:10:22:31.

Thus, regarding the issue of "solid waste," the Commission met its burden of proof and did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for "solid waste."

Compliance with Grant County Ordinance

Christenson Appellants argue the following:

Appellee PUC wrongly and prejudicially entered Finding of Fact No. 18 (FN. 24) in erroneously finding, in essence, that Appellee CRWII will be in compliance with applicable laws, including the Grant County Ordinance since, directly contrary to testimony by Jay Haley, that Appellee CRWII "complies with both versions of the Grant County Ordinance – the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the December 2018 CUP vote."

Christenson Brief, at 3. In the record, FOF 18 states the following:

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FOF 18. The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules.¹⁸ Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit.¹⁹

PUC Staff states that the Commission properly determined that the Project will comply with all applicable laws, specifically as it relates to compliance with the Grant County ordinance. Additionally, CRWII states that the record shows CRWII's commitment and ability to comply with the old and new Grant Country Sound Ordinance.

CRWII applied for its CUP for Grant County on September 17, 2018. On December 17, 2018, Grant County approved this CUP. The original ordinance was as follows:

13. Noise. Noise level shall not exceed 50 dBA, average A-weighted Sound pressure including constructive interference effects at the perimeter of the principal and accessory structures of existing off-site residences, businesses, and buildings owned and/or maintained by a governmental entity.

On December 28, 2018, the new ordinance was adopted, and on January 28, 2019, it became effective. The new ordinance was as follows:

14. Noise. Noise level shall not exceed 45 dBA, average A-weighted Sound pressure including constructive interference effects measured twenty-five (25) feet from the perimeter of the existing non-participating residences, businesses, and buildings owned and/or maintained by a governmental entity.

In addition to FOF 18, Christenson Appellants argue that FOF 46 is also clearly erroneous:

46. The record demonstrates that Applicant has appropriately minimized the sound level produced from the Project to the following: (1) no more than 45 dBA at any

¹⁸ FOF 18 (Footnote 23): Ex. A1 at 72-76, 111-112 (Application) and Ex. A5 at 8-11 (Wilhelm Direct Testimony).

¹⁹ FOF 18 (Footnote 24): At the evidentiary hearing, pro se Intervenor Christenson questioned whether Applicant was in compliance with the Grant County Ordinance in effect at the time Grant County voted to approve the Project or the Ordinance that was made effective after the County's vote to approve the Project. Applicant testified that Grant County has indicated it intends to apply the Ordinance made effective shortly after approval of the CUP for the Project. Evid. Hrg. Tr. at 47-49 (Wilhelm) (February 4, 2020). The record in this proceeding shows that Crowned Ridge Wind II complies with both versions of the Grant County Ordinance - the one in effect at the time of the approval of the Project by Grant County, and the one made effective shortly after the vote. Evid. Hrg. Tr. at 217-218, 233-234, 237-239 (Haley) (February 4, 2020); Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A14-1 through Ex. A14-4 (Supplemental Testimony Sound and Shadow Flicker Studies); Ex. A21-1 through Ex. A21-3; and Ex. A28 and Ex. 29 (Rebuttal Testimony Sound and Shadow Flicker Results); and Ex. AC-19. Therefore, the record shows that Crowned Ridge Wind II will be in compliance with applicable laws, including the Grant County Ordinance.

non-participants' residence and (2) no more than 50 dBA at any participants' residence. . . .²⁰

Christenson Brief, at 16. Christenson Appellants argue that Conclusion of Law 9, 13, and 15 are in error:

COL 9. In the event the Project's contracted life is not extended, the record demonstrates that Applicant has appropriate and reasonable plans for decommissioning. The Project will be decommissioned in accordance with applicable state and county regulations. Applicant has agreed to Permit Condition No. 33 for purposes of decommissioning the Project.

COL 13. Applicant must comply with the applicable requirements in the Deuel County, Grant County, and Codington County ordinances.

COL 15. Based on the preponderance of the evidence presented to the Commission, the Commission concludes that all the requirements of SDCL § 49-41B-22 have been satisfied.

This court will not weigh the evidence or substitute its judgment for that of the PUC. Rather, it is this court's function to determine whether there was any substantial evidence in support of the PUC's conclusion or finding. The PUC found that CRWII followed the Grant County ordinance, and the findings, cited above, are supported by substantial evidence of reports, testimonies, and studies. CRWII held a valid CUP from Grant County. (AR 14235-14236). Furthermore, the Commission concluded the following:

The evidence submitted by [CRWII] demonstrates that the Project will comply with applicable laws and rules. Applicant committed that it will obtain all governmental permits which reasonably may be required by any township, county, state agency, federal agency, or any other governmental unit for the construction and operation activity of the Project prior to engaging in the particular activity covered by that permit. The record demonstrates that construction and operation of the Project, subject to the Permit Conditions, meets all applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

Id. (AR 14235 footnotes citing record evidence omitted).

Christenson cites *In re Conditional Use Permit Granted to Van Zanten*, 1999 S.D. 79, 598 N.W.2d 861, and PUC counters that that case is inapplicable, as its facts and laws relate to a county

²⁰ FOF 46 (Footnote 98): Exs. A2; A14; A21 (Haley Direct, Supplemental and Rebuttal Testimony); Ex. A1-I (Sound Modeling Report); Ex. A14-1 through Ex. A14-3 (Supplemental Testimony Sound Studies); Ex. A21-1; Ex. A21-3; Ex. A28, and Ex. 29 (Updated Rebuttal Sound Results).

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zoning ordinance. This is an appeal from an *agency* decision, and not an appeal from a *county* decision. Because this issue is a *county* issue, and currently ongoing in case file 25CIV20-10, the Court will not address the validity of the CUP itself in this case.

Lastly, both Staff and CRWII argue in the alternative that no Appellants are prejudiced by these sound regulations of the Grant County ordinance. The Court refuses to weigh into this argument as it is unnecessary. Because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.

Aircraft Detection Lighting System (ADLS)

The Aircraft Detection Lighting System (ADLS) statute, effective on July 1, 2019, states the following:

For any wind energy facility that receives a permit under this chapter after July 1, 2019, the facility shall be equipped with an [ADLS] that meets the requirements set forth by the Federal Aviation Administration [FAA]. . . .

SDCL § 49-41B-25.2 (in pertinent part). On April 6, 2020, the Commission issued its permit to CRWII (AR 14230-14258); therefore, this ADLS requirement applies to this permit.

Christenson Appellants argue the following:

Appellee Commission committed error in violation of statutory provisions insofar as Applicant [CRWII] failed to meet the statutory requirements of SDCL § 49-41B-25.2 by and through its failure, at the time of the Commission's hearing on the merits of Appellee CRWII's wind energy facility permit, of being equipped with – or even having applied for – the necessary and statutorily required aircraft detection lighting system (ADLS).

Christenson Brief, at 16. Christenson argues that CRWII failed to even apply for ADLS by the time of the administrative hearing seeking approval (February 4-6, 2020), and that the Commission clearly erred in its Findings of Fact 18,²¹ 30,²² and 66.²³

²¹ See Issue 1A: Compliance with Grant County Ordinance, *supra*.

²² FOF 30. Applicant will install and use lighting required by the [FAA]. Applicant will equip the Project with a FAA-approved [ADLS] to minimize visual impact of the Project starting with the commercial operation date and for the life of the Project, subject to normal maintenance and forced outages.

²³ FOF 66. The Commission finds that the Project, if constructed in accordance with the Permit Conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

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The Court finds Christenson's argument to be misguided. The plain reading of the statute requires that CRWII, the applicant wind energy facility, which receives a permit, shall be equipped with an ADLS in compliance with the FAA. Christenson appears to argue that CRWII was not equipped with ADLS at the time of the permit, which is a clear misunderstanding of the statute.

Or, alternatively, Christenson argues that CRWII had no plan to install ADLS in its Application for its facility permit (submitted July 9, 2019) at the time of the Commission's Hearing (February 4-6, 2020). This would also be a misunderstanding of the statute, which says a facility that "receives a permit . . . shall be equipped" with an ADLS. Nothing in the statute requires the "merits" of the Applicant's permit being equipped or applied for an ADLS.

Furthermore, this point is moot. Findings of Fact 30 and 51, and Permit Condition 34, all state that CRWII will install and use ADLS in compliance with the FAA. CRWII points to Permit Condition 1 (Applicant will obtain all governmental permits which reasonably may be required by any governmental unit for construction and operation activity of the Project prior to operation) and Permit Condition 34 (Applicant shall apply to the FAA for approval to utilize an ADLS and allow enough time for a FAA determination and system construction prior to operation). FOF 51 requires the Applicant to illuminate the wind turbines as required by the FAA.

Therefore, regarding the ADLS, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for ADLS.

Sound and Air Quality Studies

A. Sound Study

Christenson Appellants argue the following:

Appellee Commission failed to receive and consider Appellee [CRWII's] complete application for a wind energy facility permit through the time of the evidentiary hearing herein contrary to the requirements of South Dakota law, pursuant to SDCL § 49-41B-22(3), including the submission for review of a pre-construction sound or health study in each (or any) of the adversely affected counties.

Christenson Brief, at 18. Staff responds that Applicant met its burden of proof with respect to SDCL § 49-41B-22(3). CRWII responds that it carried its burden that the Project will not substantially impair the health or welfare of inhabitants.

South Dakota law states that the “applicant has the burden of proof to establish by a preponderance of the evidence that . . . the facility will not substantially impair the health, safety or welfare of the inhabitants. . . .” SDCL § 49-41B-22(3).

Christenson Appellant states that “[a]lthough four (4) proposed experts appeared and gave testimony and evidence at the evidentiary hearing for Appellee CRWII, no infrasound or low frequency sound study was requested to be conducted, nor any study submitted to Appellee PUC for evidentiary analysis and review.” Christenson Brief, at 19.

Staff responds that (1) there is no legislative directive as to how an applicant must establish that a project will not substantially impair the health and welfare of the community; and (2) there is no rule that mandates how the applicant must satisfy the burden. Staff’s Brief, at 11. Staff then states that the Commission found sufficient evidence in the record to demonstrate that “the sound from the Project would not substantially impair the health and welfare of the community.” *Id.*, (Findings of Fact 68, AR 14244). This finding was supported by substantial evidence in the record, including “expert testimony from both health experts and acousticians, with no corresponding intervenor testimony to contradict these experts.” *Id.*

Again, the statute, SDCL § 49-41B-22, does not require an act that Appellants claim exists. Rather, it simply states that CRWII must prove its facility will not substantially impair the health, safety or welfare of the inhabitants. As Staff argued, there are no specific mandates on completing this task.

Therefore, regarding the sound study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the sound study.

B. Air Quality Study

Christenson Appellants argue that “contrary to the regulatory requirements of ARSD 20:10:22:21, no air quality study was requested nor submitted to Appellee PUC for review.” Christenson’s Brief, at 20. This ARSD states the following:

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The applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted.

ARSD 20:10:22:21.

CRWII argues that in its Application, it explained in detail that the Project's operations did not implicate air quality standards. CRWII's Brief, at 30. (AR 99-100). The Commission concluded "The evidence further demonstrates that there are no anticipated material impacts to existing air and water quality, and the Project will comply with applicable air and water quality standards and regulations." *Id.*; (AR 14237).

This ARSD does not require that an air quality study be submitted, only that it would comply with standards and regulations. Therefore, regarding the air quality study, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for the air quality study.

As to each of these issues raised the Commissions finding that the applicant has met its burden of proof as to the applicable rules and laws and that the Project will not negatively impact the health and welfare of the inhabitants was not clearly erroneous and is affirmed by this court.

PART II: EHLEBRACHT APPELLANTS

This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. This court will not address the arguments of easements or takings, the histories of regulatory limitations of shadow flicker borrowed from German standards, or whether this is a discharge of light in accordance with SDCL § 43-13-2(8). This is not the proper place nor time for these arguments. This court does not have the jurisdiction to hear these argument, rendering them moot in this appeal. The court does however, address the following issues raised by Ehlebracht Appellants.

Minimal Adverse Effect

Ehlebracht Appellants argue the following issue:

Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL § 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effect," may proceed on a case-by-case or *ad hoc* basis to permit a burden of "effects" upon both citizens and their properties under

variable regulatory limits developed by others, including those interested in the promotion of wind development.

Ehlebracht Brief, at 2, 12. This South Dakota statute states the following:

To implement the provisions of this chapter regarding facilities, the commission shall promulgate rules pursuant to chapter 1-26. Rules may be adopted by the commission:

- (1) To establish the information requirements and procedures that every utility must follow when filing plans with the commission regarding its proposed and existing facilities;
- (2) To establish procedures for utilities to follow when filing an application for a permit to construct a facility, and the information required to be included in the application; and
- (3) To require bonds, guarantees, insurance, or other requirements to provide funding for the decommissioning and removal of a solar or wind energy facility.

SDCL § 49-41B-35 (“Promulgation of rules”).

Ehlebracht’s argument of the *ad hoc* basis is that the Commission has permitted more stringent standards for other wind energy facilities, specifically Prevailing Wind Park,²⁴ than others, such as the CRWII Project here. These standards include “effects” such as noise and shadow flicker.

Staff argues that the Commission is not required to promulgate rules defining “minimal adverse effects,” but rather is permitted this rulemaking authority. Staff’s Brief to Ehlebracht, at 7. Furthermore, Staff argues that the state statute instructs the Commission to review permit applications on case-by-case or *ad hoc* bases.²⁵ CRWII likewise makes the same argument, the Commission has discretion, not the legal obligation to adopt rules. CRWII’s Brief, at 8-9.

The state statutes and ARSD clearly permit the Commission to adopt rules and procedures. Ehlebracht’s argument here focuses on requiring the Commission to adopt a standard that applies to all windfarms. Currently, the laws require that the Commission defers to local county ordinances. As evidenced within this case itself, there are three counties (Codington, Deuel, and Gran), each with their own separate standards.

²⁴ This wind energy facility is in Bon Homme, Yankton, and Charles Mix counties.

²⁵ See SDCL §§ 49-41B-11 through 49-41B-25, inclusive.

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Therefore, regarding this issue, the Commission did not err when granting a permit to CRWII. Furthermore, because the Commission did not err in its decision, the question of prejudice need not be discussed for this issue.²⁶

Issue 2: Easements and Servitudes

Ehlebracht Appellants argue the following issue:

Whether SDCL § 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

Ehlebracht Brief, at 18. This South Dakota statute states the following:

The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements:

...
(8) The right of receiving air, light, or heat from or over, or discharging the same upon or over land . . .

SDCL § 43-13-2(8).

Ehlebracht Appellants argue that the right to discharge light upon or over land is an affirmative easement. Ehlebracht Brief, at 21. Staff argues that the "Commission is not a court of general jurisdiction and has no authority to assess property rights, nor waive any underlying law, ordinance or regulation that otherwise applies to the construction of wind turbines." Staff's Ehlebracht Brief, at 12. CRWII argues that this statute "is wholly outside the statute the Legislature enacted for the Commission to administer." CRWII's Brief, at 20; *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp.*, 245 N.W.2d 639, 641 (S.D. 1976) ("The Public Utilities Commission is an administrative body authorized to find and determine facts, upon which the statutes then operate. It is not a court and exercises no judicial functions").

²⁶ Ehlebracht Appellants also casually state that the equal protection laws are violated (Art. 6, 18, S.D. Const.; 14th Amendment, U.S. Const.). The Court finds this argument without merit, as it does not provide evidence aside for claims that one county ordinance has a more stringent ordinance than that of another county on the other side of the state.

Here, the Court agrees with the appellees that this issue is outside its jurisdiction. This court's role, in this procedural appeal, is to determine whether the regulatory agency was clearly erroneous or not in its findings. Therefore, regarding this issue, the Court will not weigh into the question of easements.

Taking and Per Se Nuisance

Ehlebracht Appellants argue the following issue:

Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and without the provisions of SDCL § 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Ehlebracht Brief, at 27. Ehlebracht Appellants state that they will be subject to the Effects given off by the Project (such as noise and shadow flicker). Without the appellants granting permission, this would in effect "accomplish[] a *taking* of the property interests of these Appellants." *Id.*, at 29.

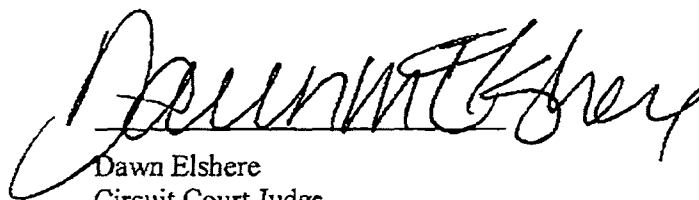
Staff argues that the Commission's order granting CRWII a permit to construct a wind energy facility is not a taking or a *per se* nuisance. Regarding a "taking," Ehlebracht fails each of the four theories under South Dakota case law. *Benson v. State*, 710 N.W.2d 131, 149 (S.D. 2006) (a regulatory physical taking; a permanent physical invasion of property; depriving owner of all economically beneficial uses of property; and a land-use exaction violating standards). Regarding *per se* nuisance, Staff argues that Ehlebracht's claim is not ripe, nor do the appellants submit sufficient evidence for the court to determine a taking has occurred. *See Boever, v. South Dakota Bd. of Accountancy*, 526 N.W.2d 747 (S.D. 1995). CRWII argues that the *per se* nuisance is insufficient to create a ripe controversy. *See Boever*, 526 N.W.2d at 750.

The Court here agrees with Appellees' arguments. Ehlebracht has not established that noise and shadow flicker is a taking under South Dakota law, and the *per se* nuisance is not ripe for controversy. Therefore, the court will not address either of these issues.

CONCLUSION

Considering the Commission's findings, inferences, and conclusions, the Commission was not clearly erroneous and did not abuse its discretion in granting the permit to Crowned Ridge II. The Commission's decision was supported by extensive findings and conclusions that were supported by an exhaustive and complete administrative record. Therefore, the court affirms the Commission's decision and denies all of issues raised by each group of Appellants (Christensen and Ehlebracht). Counsel for the Appellee is directed to prepare an Order affirming the Decision of the Public Utilities Commission.

BY THE COURT:



Dawn Elshere
Circuit Court Judge
Third Judicial Circuit

18.0 Community Impact (ARSD 20:10:22:23)

ARSD 20:10:22:23. Community impact. *The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:*

- (1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;*
- (2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;*
- (3) A forecast of the impact on agricultural production and uses;*
- (4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;*
- (5) A forecast of the impact on transportation facilities;*
- (6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the*

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applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and
 (7) *An indication of means of ameliorating negative social impact of the facility development.*

This section describes the main community characteristics in and around the Project Study Area, including the Project's impacts on socioeconomics, community resources, agriculture, transportation, and cultural resources. Socioeconomic variables evaluated include population, minority populations, poverty, employment and income, and housing. These variables were obtained or derived from the U.S. Census Bureau 2010 census and the 2013–2017 American Community Survey data and projections.

18.1 Socioeconomic and Community Resources

The socioeconomics analysis area is Codington, Deuel, and Grant Counties. Data for the City of Watertown and the State of South Dakota are used occasionally for comparison purposes.

18.1.1 Existing Socioeconomic and Community Resources

Table 18.1 summarizes select demographic factors for Watertown, Codington County, Grant County, Deuel County, and South Dakota. Deuel County's percentage of minorities is lower than Codington County, Grant County, Watertown, and the state. The percent of population living below the poverty level is highest for the state, followed by Watertown, Codington County, Deuel County, and Grant County.

Table 18.1. Socioeconomic Factors in Select Regions

Location	Population	Minority Populations (Percent)	Population Below Poverty Level (Percent)	Per Capita Income
Watertown	22,083	5.5	13.0	\$28,783
Codington County	27,963	5.3	11.7	\$29,249
Grant County	7,133	4.5	7.6	\$29,363
Deuel County	4,282	0.4	10.0	\$29,204
State of South Dakota	855,444	15.3	13.9	\$28,761

Source: U.S. Census Bureau 2013-2017

The median annual household income in 2017 (using 2017 inflation-adjusted dollars) was \$48,485 in Watertown, \$52,025 in Codington County, \$56,276 in Grant County, \$57,969 in Deuel County, and \$54,126 in the state of South Dakota (U.S. Census Bureau 2013-2017). The median annual household income accounts for multiple household earners, whereas the per-capita income (see Table 18.1) is the average income earned by each person in a given area so that multiple income earners in the same family or household are counted separately. Using 2017 inflation-adjusted dollars, the per-capita income in Watertown was \$28,783, in Codington County was \$29,249, in Deuel County was \$29,204, and in Grant County was \$29,363, while the

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per-capita income for the state was \$28,761. The percentage of persons living below the poverty level ranked highest at the state level at 13.9%, followed by Watertown at 13.0%, Codington County at 11.7%, Deuel County at 10.0%, and Grant County at 7.6% (U.S. Census Bureau 2013-2017).

As shown in Table 18.2, the largest employment and labor markets by occupation in Watertown and Codington County are similar and consist of sales and administration (29.7% and 27.9%, respectively), production and transportation (18.7% for each region), science and arts, including health facilities (11.5% and 11.6%, respectively), management (8.6% and 10.6%, respectively), and construction and extraction (5.5% and 5.6%, respectively). The largest employment and labor markets by occupation in Grant County are sales and administration (24.8%), management (14.6%), production and transportation (12.9%), science and arts, including health facilities (8.9%), and installation, maintenance, and repair (6.3%). The three largest employment industries in Watertown and Codington County are similar and include manufacturing (17.6% and 17.5%, respectively), educational and healthcare services (17.8% and 17.7%, respectively), and retail trade (18.3% and 15.8%, respectively). The three largest employment industries in Deuel County include manufacturing (18.3%), agriculture, forestry, fishing and hunting, and mining (18.1%), and healthcare and social assistance (17.0%). The three largest employment industries in Grant County are educational and healthcare services (20.6%), agriculture, forestry, fishing and hunting, and mining (15.5%), and manufacturing (10.7%) (U.S. Census Bureau 2013-2017). Smaller industries and labor markets with fewer employees in Watertown, Codington County, Deuel County, and Grant County include infrastructure, fire protection, law enforcement, recreational facilities, schools, and other community or government services.

Table 18.2. Employment by Occupation in Select Regions, Shown as Percentage of Employed Persons

Industry/Labor Market	Watertown	Codington County	Grant County	Deuel County
Sales and Administration	29.7	27.9	24.8	17.3
Production and Transportation	18.7	18.7	12.9	16.4
Science and Arts, including Health Facilities	11.5	11.6	8.9	12.5
Management	8.6	10.6	14.6	19.6
Farming	0.9	1.2	5.5	4.8
Construction and Extraction	5.5	5.6	6.1	8.8
Installation, Maintenance, and Repair	3.5	3.4	6.3	4.5
Business	3.6	3.3	2.9	1.5

Source: U.S. Census Bureau 2013-2017

Current housing and land values in the region are similar across all areas. In 2017, the U.S. Census Bureau reported 10,181 housing units in Watertown, 12,898 housing units in Codington

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County, 2,225 housing units in Deuel County, and 3,561 housing units in Grant County. The Codington County 2017 data reflect a 4.96% increase in housing units when compared with 2010 Census data, while the Deuel County 2017 data show a 0.14% increase, and the Grant County 2017 data show a 1.05% increase. Watertown shows a 3.14% increase since 2010. In 2010, the median values of owner-occupied housing units in Watertown and Codington County were similar at \$127,800 and \$131,000, respectively, while Deuel County was lower at \$87,200, and Grant County was at \$99,800. The Codington County 2017 figures reflect a 27.10% increase in value since the 2010 Census, Deuel County shows a 29.24% increase, Grant County shows a 16.03% increase, and Watertown shows a 25.98% increase.

The U.S. Census Bureau provides periodic socioeconomic estimates for selected geographies to help provide information on the changing demographics of the population between decennial censuses. Through the American Community Survey, the Census provided 3-year socioeconomic estimates for Codington, Deuel, and Grant Counties and the State of South Dakota, as summarized in Table 18.3 (U.S. Census Bureau 2013-2017).

Table 18.3. Socioeconomic Projections from 2013 to 2017

Location	Population	Race Percentage (White)	Percentage of Population Below Poverty Level	Per Capita Income
Watertown	22,083	94.5	13.0	\$28,783
Codington County	27,963	94.7	11.7	\$29,249
Grant County	7,133	95.5	7.6	\$29,363
Deuel County	4,282	99.6	10.0	\$29,204
South Dakota	855,444	84.7	13.9	\$28,761

Source: U.S. Census Bureau 2013-2017

18.1.2 Socioeconomic and Community Resources Impacts/Mitigation

There will be short- and long-term benefits from the Project that include, but are not limited to, an increase in the Counties' tax base as a result of the incremental increase in revenues from utility property taxes (based on the Project value of \$425 million; see Section 5). The chief economic effect of the Project will result from property taxes paid for the proposed improvements in Codington, Deuel, and Grant Counties infrastructure of approximately \$39 million. Land lease payments to Project landowners will result in approximately \$40 million over the contracted term of the Project. Additional benefits will result from the Project's capability to transmit energy generated from renewable energy resources that could spur energy development in the area, thereby generating additional economic gains. Further information on benefits of the Project is presented in Section 4.0.

Construction and operation of the Project is not expected to affect the local distribution of jobs or occupations in the community and is not anticipated to have significant short- or long-term

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effects on commercial and industrial sectors, housing, land values, labor markets, health facilities, sewer or water treatment facilities, solid waste management facilities, fire or police facilities, schools, recreational facilities, and other government facilities or services. The Applicant does not expect a permanent impact on the population, income, occupation distribution, or integration or cohesion of communities.

The Project will be offset from roads and section lines, and the turbines and Project Construction Easement are not located within state or county highway ROWs. Also, collection lines will bore under roads. The final engineering design will consider planned or programmed future improvements to area roadways to ensure that sufficient roadway ROWs are maintained for future roadway widening. The Applicant has developed a Road Use Agreement with each County that will govern procedures for road use, repair, and restoration after construction, and any operational maintenance required.

The Project will have a positive impact on the local area as a result of lodging and food sales and other indirect economic benefits associated with transient workers. The Applicant expects the Project will employ workers associated with the construction and support services areas. Employee estimates are described in Section 19.

A common concern of communities surrounding wind energy facilities is the potential impact on residential property values. Wind energy projects drive economic development, job growth, and tax revenue which benefits landowners and land values in areas (Appendix L; NextEra Fact Sheet). Landowners who host wind turbines on their property earn regular lease payments, which add to its value, and lease payments continue with a sale of the property. Hoen et al. (2009) collected data from 7,500 sales of single-family homes situated within 10 miles of 24 existing wind facilities in nine different states. Rural areas in Iowa, Illinois, and Wisconsin that were analyzed in the study are similar in nature to the communities in South Dakota found in the current Project Area.

Analysis of eight hedonic pricing models on repeat sales and sales volume models shows no conclusive evidence of impacts of wind facilities to widespread property value in communities surrounding these facilities. Hoen et al. (2009) conclude the following:

Neither the view of the wind facilities nor the distance of the home to those facilities is found to have any consistent, measurable, and statistically significant effect on home sales prices. Although the analysis cannot dismiss the possibility that individual homes or small numbers of homes have been or could be negatively impacted, it finds that if these impacts do exist, they are either too small and/or too infrequent to result in any widespread, statistically observable impact. (Hoen et al. 2009:iii).

The base model for the study also concluded the following: 1) there is no statistically significant difference in sales price between homes found within 1 mile and 5 miles of wind energy

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facilities; and 2) while home buyers and sellers consider the scenic vista of a home when establishing sales prices, there is no statistically significant home sale price difference apparent in the model for homes having minor, moderate, substantial, or extreme views of wind turbines (Hoen et al. 2009).

Additionally, Hoen et al. (2013) examined data from 50,000 home sales in 27 counties in nine states analyzed, including Minnesota, Iowa, and Illinois, which are similar in rural nature to South Dakota. The study found no statistically significant difference in home sales prices between 1 to 5 miles of wind turbines within a wind energy facility during the post-construction or post announcement/pre-construction periods of wind energy facilities. Research suggested that the "property-value effect of wind turbines is likely to be small, on average, if it is present at all" (Hoen et al. 2013:iii).

RM Hoefs & Associates, Inc., completed a 2015 survey of marker reactions to wind turbines and/or wind energy facilities with the objective of studying the effects of wind turbines on property values (see Appendix L, RM Hoefs & Associates, Inc. 2015). The analysis was based on 12 wind farms in North Dakota, although paired sales were only found at five wind farms. Out of a review of 26 participants, 25 did not consider any negative impacts or detrimental conditions on property values by adjacent wind energy facilities (see Appendix L, RM Hoefs & Associates, Inc. 2015). Based on the studies outlined above, the Project is expected to have a negligible effect, if any, on the assessed values of private property and, therefore, on property taxes.

The transportation, treatment, and disposal of hazardous waste will be required in accordance with state and federal regulations. The use and storage of petroleum products will be in accordance with applicable local, state, and federal regulations, the spill prevention and response procedures established in the SWPPP, and the SPCC Plan developed for the Project. Additionally, there is the possibility that the improper use, storage, and/or disposal of hazardous materials such as fuels, oils, and maintenance fluids could result in a release that could cause contamination and exposure during construction, operation, and maintenance activities associated with the Project. Direct effects of a release will include contaminating soil and water resources; while indirect effects could include exposing humans, wildlife, and vegetation to the contamination. The SPCC Plan implemented by the Applicant will minimize this risk and the contamination potential. Specifically, this plan will ensure that necessary resources are available to respond to a release and will minimize the risk of contaminating soil and water resources and the associated exposure to humans, wildlife, vegetation, and air quality. The risk of contamination and exposure will be further minimized by the Project's overall design and SPCC Plan requirements, such as adequately sized containment structures, regular facility inspections, and properly trained personnel. As required by the SPCC rule (40 CFR 112.7(j)), the Project SPCC Plan will incorporate county and state oil storage requirements as well.

20:10:22:23. Community impact.

Currentness

The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

- (1) A forecast of the impact on commercial and industrial sectors, housing, land values, labor market, health facilities, energy, sewage and water, solid waste management facilities, fire protection, law enforcement, recreational facilities, schools, transportation facilities, and other community and government facilities or services;
- (2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;
- (3) A forecast of the impact on agricultural production and uses;
- (4) A forecast of the impact on population, income, occupational distribution, and integration and cohesion of communities;
- (5) A forecast of the impact on transportation facilities;
- (6) A forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance. The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility; and
- (7) An indication of means of ameliorating negative social impact of the facility development.

Credits

Source: 5 SDR 1, effective July 25, 1978; 12 SDR 151, 12 SDR 155, effective July 1, 1986.

General Authority: SDCL 49-41B-35.

Law Implemented: SDCL 49-41B-11(3), 49-41B-22.

Current through rules published in the South Dakota register dated May 31, 2021. Some sections may be more current, see credits for details.

S.D. Admin. R. 20:10:22:23, SD ADC 20:10:22:23

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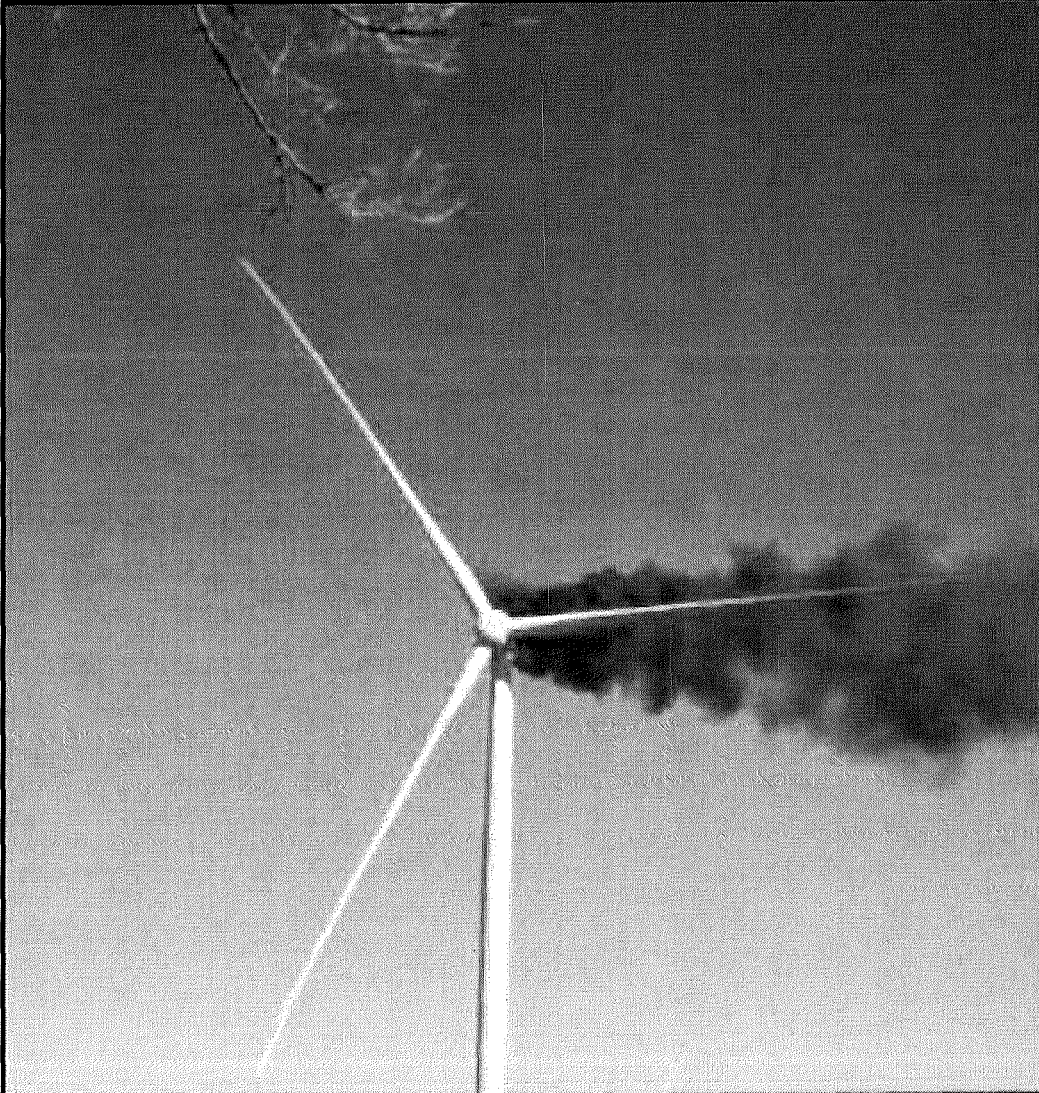


Jon Schliesman shared a post.

March 2 · 🌐

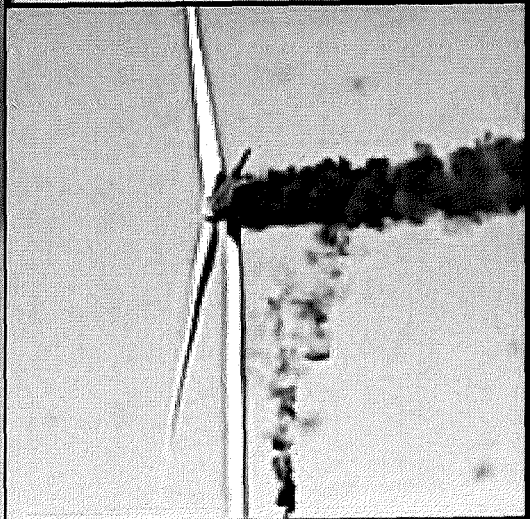
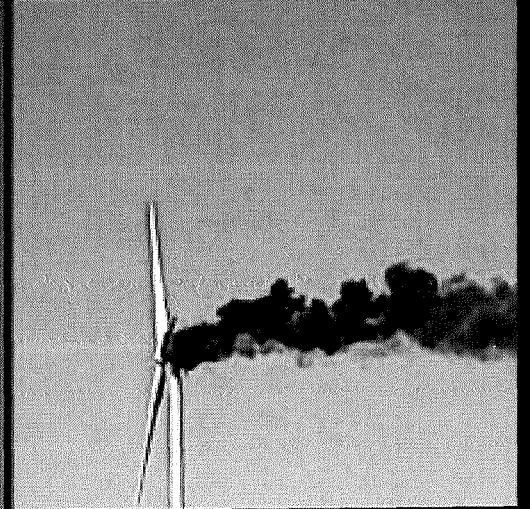


This is around the summit area.



That tower didn't last long

West of summit



Appendix E