

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

---

**IN THE MATTER OF THE  
APPLICATION BY CROCKER WIND  
FARM, LLC FOR A PERMIT OF A  
WIND ENERGY FACILITY AND A 345  
KV TRANSMISSION LINE IN CLARK  
COUNTY, SOUTH DAKOTA, FOR  
CROCKER WIND FARM**

---

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

**INTERVENORS' POST-HEARING  
BRIEF REQUESTING DENIAL OF THE  
PERMIT APPLICATION**

**EL17-055**

Intervenors, through counsel, hereby submit this brief requesting the Commission deny Crocker Wind Farm, LLC's ("Crocker")<sup>1</sup> Application for a Permit of a Wind Energy Facility and a 345 KV Transmission Line in Clark County, South Dakota.

**INTRODUCTION**

Crocker is seeking a permit from the Commission to build a wind farm in Clark County, SD. As the applicant, Crocker has the burden of proof to establish its proposed project satisfies the provisions of SDCL 49-41B-22. Intervenors do not have the burden of proof to show the proposed project does not satisfy SDCL 49-41B-22. Neither does the PUC Staff. Therefore, if there remains a question as to whether the proposed project complies with SDCL 49-41B-22, the permit application must be denied. As shown below, Crocker has not satisfied its burden. Therefore, Intervenors respectfully request the Commission deny Crocker's permit application.

**ARGUMENT**

Crocker had the burden of proof to establish that the proposed project (1) will comply with all applicable laws and rules; (2) will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the area; (3) will not substantially impair the health, safety or welfare of the inhabitants; and (4) will not

---

<sup>1</sup> Throughout this brief, Intervenors will refer to Crocker and Geronimo Energy together as "Crocker."

unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government. SDCL 49-41B-22. Crocker failed to satisfy its burden in several respects.

**I. Crocker Failed to Prove the Project Will Not Pose a Threat of Serious Injury to the Environment**

**A. Project Area Is Not Suitable for Wind Development Because of Its High Conservation Value**

The project area lies within the Prairie Coteau ecoregion and Prairie Pothole region. In general, these areas have high conservation value, largely because of the high wildlife use in these areas. The project area is no different; indeed, it embodies the environmental value those regions offer. There are nearly 1,400 wetlands and waterbodies in the project area, accounting for nearly 10% (2,908 acres) of the project area. (Ex. A-1 pp. 60, 93.) Approximately 45% (13,260 acres) of the project area consists of undisturbed native grassland. (*Id.* at p. 93.) Moreover, there are numerous U.S. Fish and Wildlife Service (“USFWS”) easements located within project area (5,582 acres of grassland easements and 2,439 acres of protected wetland basins<sup>2</sup>) totaling 8,021 acres of protected easement land.<sup>3</sup> (*Id.* p. 99.) Put simply, most of the project area is made up of areas with high conservation value.

Both USFWS and S.D. Game, Fish, and Parks (“SDGFP”) have stated repeatedly how valuable the project area is in terms of conservation value and warned about the effects that will result from wind development in this area. (Exs. I-22, I-23, I-24, I-25, I-39, I-40, I-42, I-43, I-45, I-47, I-48, I-49, I-64.) Here are just a few noteworthy examples:

---

<sup>2</sup>Crocker does not include the number of acres generally covered by wetland easements and limits its figure to the acres of “protected wetland basins.”

<sup>3</sup> There are also 757 acres of Natural Resource Conservation Service easement land in the project area. (Ex. I-62 at 3-6; Transcript at 375: 22 – 377: 21.) Crocker cannot even identify where that easement land is located. (Transcript at 375: 22 – 377: 21.)

### ***General Concerns***

- “The majority of the proposed project area lies within the Prairie Coteau ecoregion. This ecoregion is unique to South Dakota.” (Ex. I-23 p. 2.)
- “The Crocker Wind Farm is located in a grassland/wetland complex used by numerous grassland nesting species, and has been identified as a high-use area for waterfowl with more than 100 breeding birds per square mile.” (Ex. I-25 p. 2.)
- “[USFWS’s] initial examination reveals that numerous Service easements and fee title properties exist in Clark County, including the proposed project area. This is a testament to the high wildlife value of the area and relatively greater environmental impacts that may be anticipated if the proposed project is constructed there.” (Ex. I-24 p. 1.)
- “[T]he numerous grassland/wetland easements in and surrounding the project area generally indicate relatively high value for wildlife. GFP has indicated the project area is a hot spot for migrating waterfowl. Thus there may be a relatively greater risk to trust resources at this location compared to more agriculturally dominated areas of the state.” (Ex. I-39.)
- “A primary threat to many grassland species that occur in South Dakota is habitat loss and fragmentation. The area proposed for construction of this wind development appears to be in an area of intact grassland with associated wetland complex—i.e., a highly valuable area for prairie wildlife.” (Ex. I-22 p. 3.)
- “[T]he Crocker Wind Farm appears to be in a high wildlife use area.” (Ex. I-25 p.3)  
“Currently, perhaps the best means of avoiding impacts to wildlife is to avoid placing wind farms within high wildlife use areas.” (Ex. I-24 p. 5.)

### ***Regarding Wetlands***

- “[N]umerous wetlands exist within the proposed project area, including several relatively large water bodies which may attract high numbers of migratory birds . . . . [USFWS] recommends complete avoidance of these areas, if possible[.]” (Ex. I-24 p. 4.)
- “Wetland basins are found throughout most of the proposed project area. Turbines should not be placed in or near wetland basins and special care should be made to avoid areas with high concentrations of wetlands.” (Ex. I-23 p. 3.)
- “Wetland losses in the Prairie Pothole region are staggering and range from 99% in Iowa to 35% in South Dakota.” (Ex. I-23 p. 3.)
- SDGFP suggested the project area is “somewhat unique based on the number of wetland basins in it[.]” (Transcript at 555: 18-19.)

***Regarding Native Grasslands and Contiguous Blocks of Grassland***

- “We have estimated, based on turbine layouts you have provided that 41% of turbines comprising the Crocker Wind Farm are proposed to be installed on native prairie. Some wildlife species can adapt to a variety of grassland types, but native prairies are of particular importance due to their increasing rarity; the continued loss of native prairies imperils many species . . . that cannot survive without intact prairie ecosystems. Additionally, true restoration of these areas post-disturbance is highly difficult if not impossible, thus native prairie impacts cannot fully be rectified.” (Ex. I-25 p. 1)
- “Contiguous blocks of grassland . . . regardless of cropping history, quality or current management also have conservation value. Many grassland wildlife species are sensitive to habitat fragmentation.” (Ex. I-23 p.2)

***Regarding Bald Eagles and Whooping Cranes in the Area***

- Noting that “bald eagles nest in the vicinity of the project, are known to occur at times in high numbers near the site during waterfowl migration (i.e., Reid Lake), and eagle use has been documented within the project boundaries[.]” (Ex. I.64 p.2)
- “Improperly sighted wind farms are known to cause significant mortality to raptors.” (Ex. I-23 p.3)
- “The South Dakota-specific whooping crane migration corridor map has been provided to Crocker and Crocker is aware that the project falls within the 95% SD migration corridor. Past records listed in the EA clearly show that whooping cranes have been documented in the area. The potential for whooping cranes to occur at the Crocker site exists.” (Ex. I-64 p.12)

Many of these exact environmental concerns were expressed to Crocker as early as December 1, 2010, shortly after Crocker notified USFWS that it was exploring wind development in the project area. (Ex. I-22.) Indeed, USFWS specifically stated that “[a]lternatives should be examined and the least damaging practical alternative selected.” (*Id.* at p. 3.) USFWS further noted “the best means of avoiding impacts to wildlife is to avoid placing wind farms within high wildlife use areas.” (*Id.* at p. 4.) Despite being put on notice of the project area’s high environmental value in December 2010, Crocker ignored USFWS’s recommendation to examine alternatives and chose to move forward with its development plans

in the project area—even though at the time Crocker had relatively little invested into the project. (Transcript at 57: 11-21.)

Not only did Crocker ignore USFWS’s recommendation to examine alternative locations, Crocker expanded its project into even more environmentally-sensitive areas to the north. (Ex. I-25; *see also* Application, Figures 11, 13, and 15 (showing more wetlands, undisturbed native grasslands, and USFWS easements in the northern 3x4 mile expansion than in other similarly-sized parts of the proposed project).) In response to the expansion, USFWF noted: “In short, the Crocker Wind Farm appears to be in a high wildlife use area and the proposed boundary expansion appears to exacerbate, rather than alleviate, direct and indirect risks posed to wildlife should the project be constructed as currently proposed.” (*Id.* at p. 3.)

The project area is indisputably a high wildlife use area that has high conservation value. (Exs. I-22, I-23, I-24, I-25, I-39, I-42, I-48, I-49, I-64.) That is because more than half of the project area consists of wetlands, open waters, undisturbed native prairie, and/or USFWS easement land—areas from which USFWS and SDGFP have consistently recommended avoidance. The area simply is not suitable for wind development.

**B. Wildlife Surveys Were Performed Poorly and the Final Results Have Not Even Been Reported**

In March 2016, SDGFP communicated to Crocker that “[a]t least two years of pre-construction surveys should be conducted . . . to evaluate any potential impacts to wildlife. If major impacts are predicted, avoid development in this area.” (Ex. I-23 p. 1.) Thereafter, Crocker began conducting wildlife surveys. (Transcript at 265: 1-2.)

Just seven months after Crocker first began conducting wildlife surveys, Crocker met with USFWS and SDGFP to discuss the results of the surveys. (Ex. I-43.) During that meeting, USFWS expressed that one year’s worth of data was insufficient to analyze the project’s

anticipated effect on wildlife—noting that “interannual variability may result in different species being observed.” (*Id.*) Crocker, however, did “not see two years of data as providing further statistical value and requested that the USFWS proceed with one year data set.” (*Id.*) In other words, Crocker was not interested in conducting more than one year’s worth of wildlife surveys and was ready to move forward with construction regardless of the results any additional surveys may yield. Reluctantly, Crocker conducted more surveys.

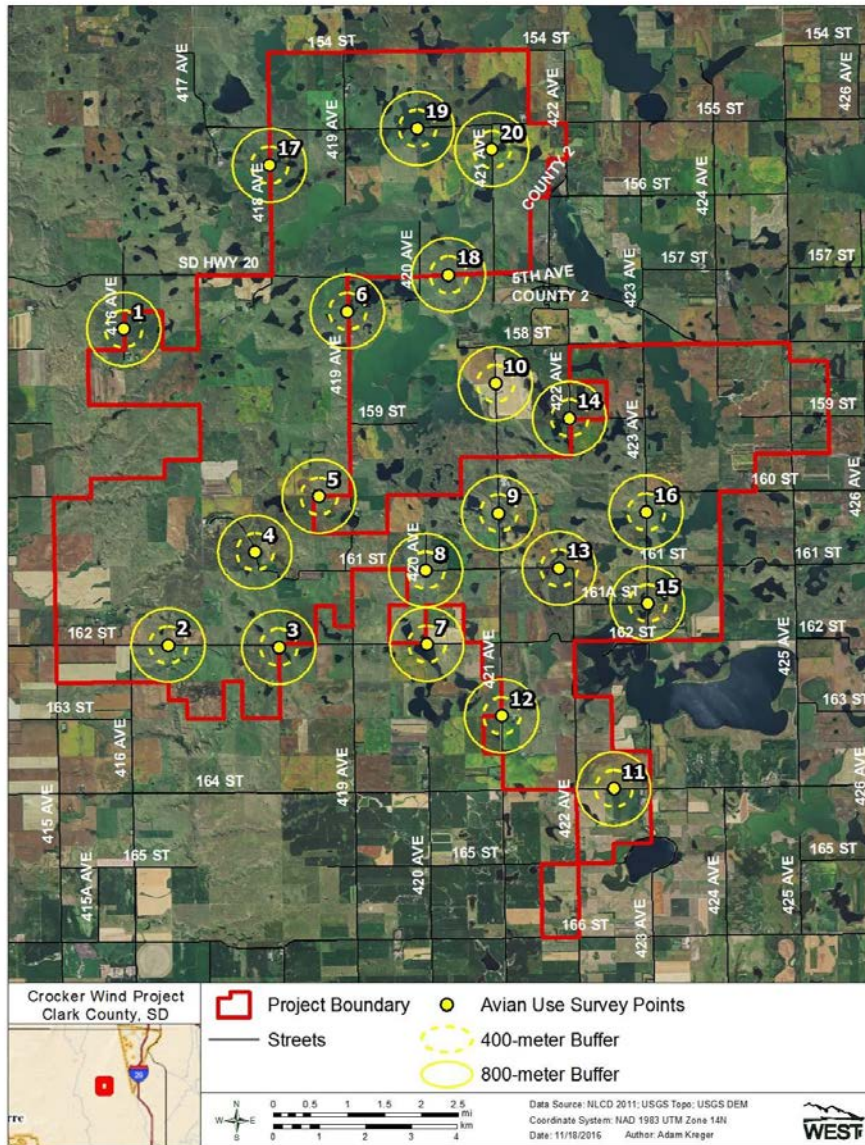
The wildlife surveys performed by Crocker are summarized in Joyce Pickle’s rebuttal testimony. (Ex. A-13 p. 2-3.) Notably, Crocker did not coordinate with SDGFP’s local conservation officer to determine the best manner in which to conduct such surveys, despite conceding he would be a good resource. (Transcript at 266: 12-22.) Moreover, the person in charge of the surveys **never even visited the project area, not once.** (Transcript at 339: 2-3.) As a result, the wildlife surveys performed by Crocker lack any reliability.

### *Avian Use Surveys*

Crocker performed two years of avian use studies from April 2016 through April 2018. (Ex. A-13 p. 3-4.) In doing so, Crocker analyzed the project area from 20 survey points the first year and from 28 survey points the second year. (Transcript at 282: 15-19.) That means that in Year 1 there was one survey point per 1,467 acres (i.e.,  $29,331/20 = 1,467$ ).<sup>4</sup> Obviously, the majority of the project area was not surveyed. This is demonstrated by Figure 2 in Exhibit A-13-8:

---

<sup>4</sup> Stated differently, to cover the entire project area, each survey point would have been responsible for over two sections of land.



Results from the first year survey were reported in Exhibit A-13-8 and reveal that seventeen sensitive species were recorded in the project area, seven of which “are listed as species of greatest conservation need in the South Dakota Wildlife Action Plan: bald eagle, American white pelican, chestnut-collared longspur, black tern, marbled godwit, Wilson’s phalarope, and willet.” (Ex. A-13-8 p. ii.) Had more of the project area been surveyed, it begs the question how many more sensitive species would have been recorded, especially given the project area is a high wildlife use area.

Results from the second year survey have not been reported. (Transcript at 283: 4-15.) During the evidentiary hearing, Crocker claimed the results of the second year survey were not necessary to evaluate whether the proposed project will pose a threat of serious injury to the environment. (Transcript at 321: 11 – 323: 12.) That self-serving claim is not surprising, given Crocker’s lack of desire to even conduct the second year of surveys as it believed a second year of data would not provide any “statistical value.” (Ex. I-43.) Intervenors, on the other hand, disagree. The survey was performed to evaluate “the seasonal, spatial, and temporal use patterns of birds within the Project.” (Ex. A-13-8 p. I (Avian Use Study – Year 1 Report).) The data generated from such surveys are “useful for evaluating potential impacts from the proposed wind energy facility.” (*Id.*) Therefore, Crocker’s claim that the second year data need not be analyzed goes against the very purpose for conducting the surveys. It is also inconsistent with the positions of USFWS and SDGFP, as both agencies requested multiple years of pre-construction surveying.

***Eagle Surveys / Eagle Conservation Plan Guidance (ECPG)***

Part of the aforementioned avian use surveys evaluated eagle use in the area. In addition to those surveys, Crocker performed three different nest surveys to evaluate eagle presence in the area. Each progressive survey revealed more active eagle nests than the one prior. (Transcript at 272: 21 – 275: 10.) In fact, one such nest was not even discovered in a survey and instead located by Intervenors. (*Id.*) Further, another active eagle nest has been spotted within the project area. (Transcript at 499:14 – 503: 4.) This is not surprising given bald eagles “are known to occur at times in high numbers near the site during waterfowl migration (i.e., Reid Lake), and eagle use has been documented within the project boundaries per pre-construction



surveys[.]” (Ex. I-64 p. 2.) Nevertheless, Crocker claims the project will not significantly impact bald eagles.

The results of the eagle-related surveys are used for Crocker’s Eagle Conservation Plan Guidance (“ECPG”); the “overall goal” of which “is to help assess risks to eagles” caused by the project. (Transcript at 270: 13-17.) Crocker conceded during the evidentiary hearing that the ECPG process is not complete, and in fact that the second year of data must be analyzed to determine the risk to eagles. (Transcript at 348: 16-24.) Of course, this concession cuts against Crocker’s claim that the second year survey data need not be analyzed.<sup>5</sup> Yet, Crocker inexplicably claims the project will not significantly impact bald eagles. This conclusion belies their own admission regarding the need for two years of surveying data.

Furthermore, Crocker claimed it has been coordinating with USFWS for its ECPG. (Transcript at 271: 6-22.) According to Exhibit I-64, that would be news to USFWS. USFWS notes:

The EA currently states that the risk to eagles is “low”; however, we are unable to tell if this determination was informed via use of the ECPG model, or any other equivalent/approved model. Given that bald eagles nest in the vicinity of the project, are known to occur at times in high numbers near the site during waterfowl migration (i.e., Reid Lake), and eagle use has been documented within the project boundaries per pre-construction surveys, we continue to recommend the proponents apply an appropriate, scientific method (preferably the ECPG model) to inform whether an eagle take permit may be needed for this project. . . . [T]o our knowledge [Crocker has] not applied appropriate and/or recommended methods to determine [eagle] risk, nor [has it] indicated specific measures will be taken to reduce the risk of eagle take.

(Ex. I-64 pp. 2-3 (emphasis added).) Because the agency with which Crocker has purportedly been “coordinating” has no knowledge as to whether Crocker applied appropriate methods to determine eagle risk and does not know what measures Crocker will take to reduce eagle risk,

---

<sup>5</sup> USFWS recommends “at least 2 years of eagle use data.” (Transcript at 271: 20-22.)

Crocker's claim that the project will not significantly impact bald eagles lacks any reliable foundation.

It was clear back in November 2016 that Crocker did not care about the wildlife surveys and was only conducting them at the behest of USFWS and SDGFP. (Ex. I-43.) The effort Crocker put into the surveys highlights its indifference (e.g., few survey points; did not contact local conservation officer; person in charge of surveys never once visited the site). Crocker's indifference likely exists because the results of the wildlife surveys did not and do not matter to Crocker. Regardless of the results of the surveys, regardless of the project area being a high wildlife use area, regardless of the increasing number of eagle nests around the project and one being located in the project, regardless of seventeen sensitive species being recorded in the project area, and regardless of seven species of greatest conservation need being recorded in the project area, Crocker's position was always going to be that the project will not injure the environment. Its position, however, lacks merit.

**C. Crocker Failed to Follow the Recommendations of USFWS and SDGFP, Failed to Adequately Mitigate against Environmental Risks, and Failed to Adequately Consider Indirect Effects to the Environment**

**i. Crocker Did Not Follow Recommendations of USFWS and SDGFP**

Comparing the numerous recommendations USFWS and SDGFP provided to Crocker over the last few years with the final project layout is further evidence the project area simply is not suitable for wind development. One can only conclude that Crocker either ignored these recommendations or could not follow them, which is not surprising as Crocker made clear early in the life of the project that little could be done to help protect the environment. (*See* Ex. I-40 (noting in an October 2015 email to USFWS that the project boundary was "pretty well

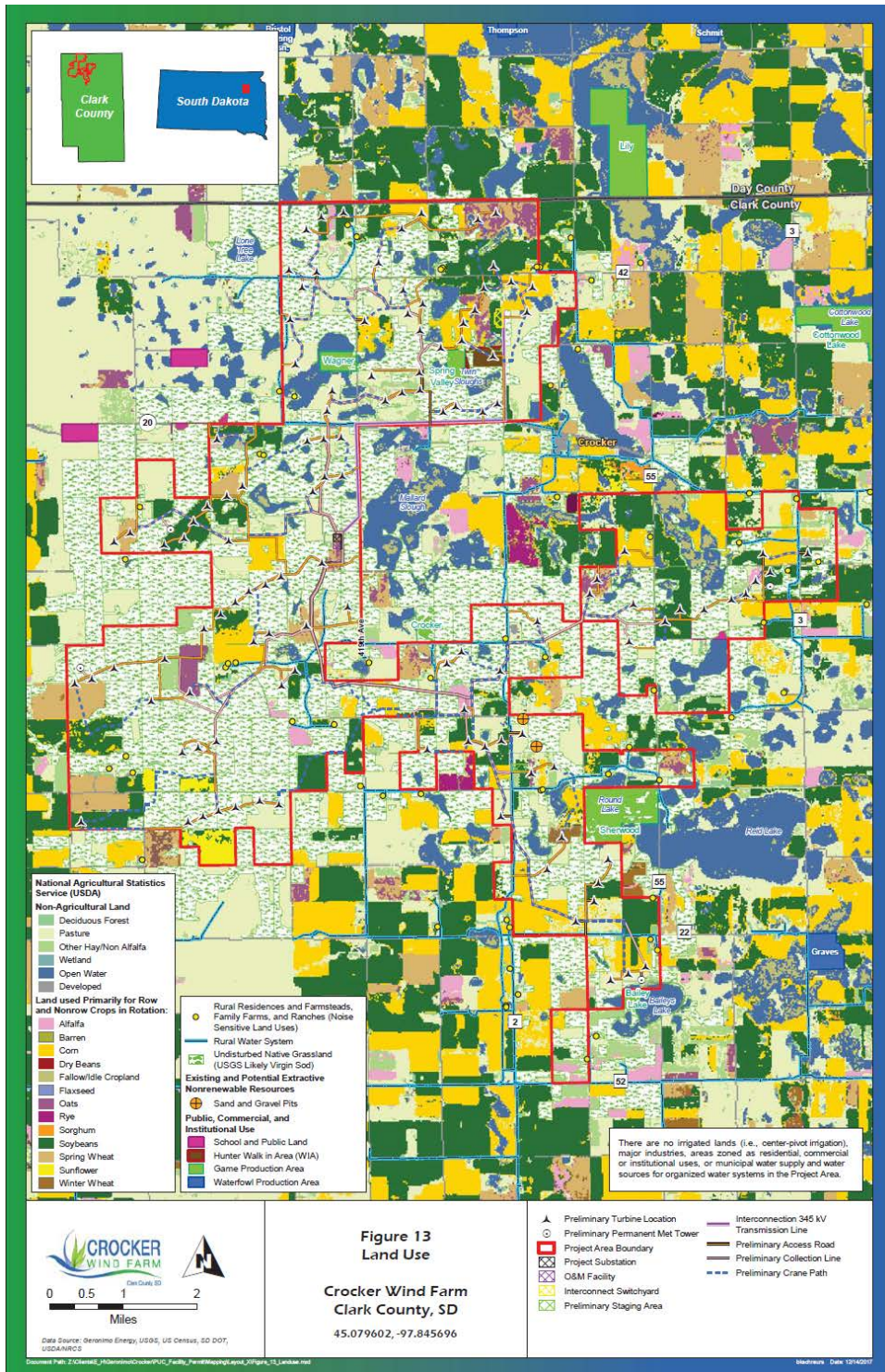
established,” making any major modifications “quite challenging,” but “small modifications” would be considered.)

### *Grasslands / Undisturbed Native Prairies*

The following recommendations were made regarding grasslands:

- “We reiterate our foremost recommendation regarding wind projects in South Dakota, relayed to you during our initial meeting and in several contacts and correspondences thereafter: **avoid and minimize impacts to grasslands to the greatest extent possible.**” (Ex. I-25 p.1 (emphasis added).)
- “Effort should be made to avoid placement of turbines and new roads in contiguous blocks of grassland. . . . Fragmentation of contiguous blocks of grassland should be avoided or mitigated.” (Ex. I-23 p.2.)
- “**Every effort should be made** to avoid placement of turbines and new roads in untilled native prairie. . . . Any loss of native prairie should be avoided or mitigated.” (Ex. I-23 p.2 (emphasis added))

Despite these recommendations, the majority of turbines are sited on grasslands, which is certain to result in severe fragmentation from turbines, access roads, crane paths, and collection lines. (Ex. A-1, Figure 13; Ex. I-12.) This is shown in Figure 13 of the Application:



Indeed, three meteorological towers and 47 turbines (along with the respective access roads, crane paths, and collection lines) are to be placed on undisturbed native grassland. (Ex. I-1 p. 110.) USFWS specifically highlighted that fact in its most recent comments and again

recommended “avoidance of grasslands, regardless of easements[.]” (Ex. I-64 p. 13.) If Crocker truly made “every effort” to avoid native prairies and avoided grasslands “to the greatest extent possible,” then a review of Figure 13 of the Application shows this area simply is not suitable for wind development.

### *Wetlands*<sup>6</sup>

The following recommendations were made regarding wetlands:

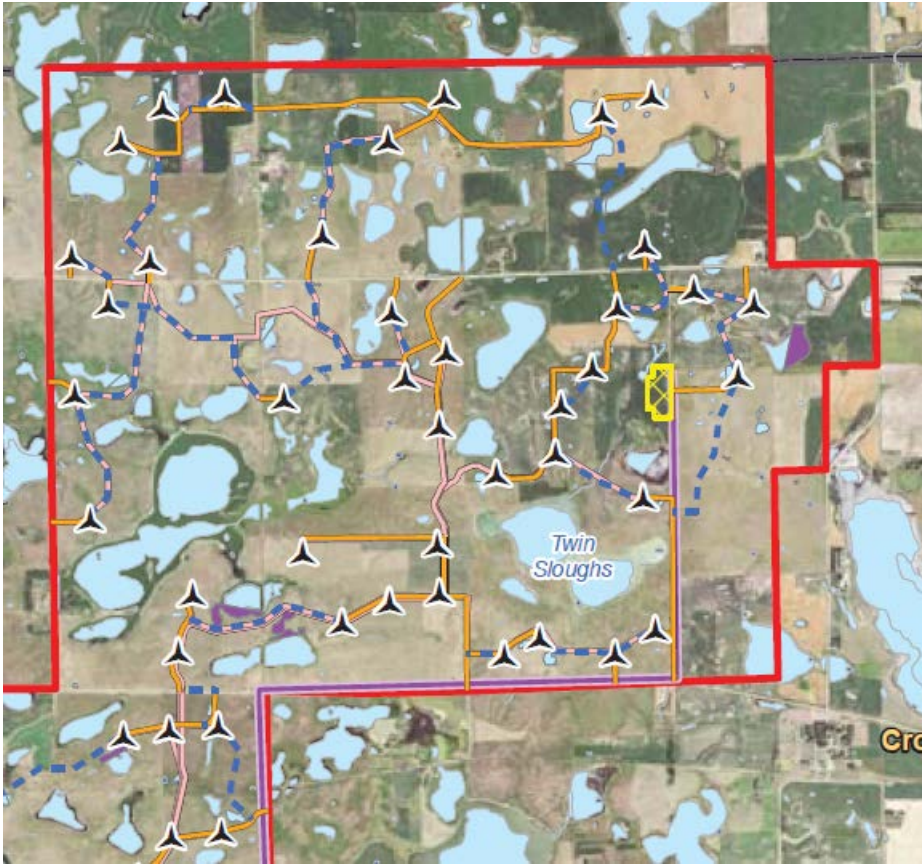
- “[A]voidance first—no turbines in grasslands, establishing maximum setbacks from wetlands, and/or **avoiding siting turbines between wetlands.**” (Ex. I-49 (emphasis added).)
- “[N]umerous wetlands exist within the proposed project area, including several relatively large water bodies which may attract high numbers of migratory birds . . . . [USFWS] recommends **complete avoidance of these areas, if possible[.]**” (Ex. I-24 p. 4 (emphasis added).)
- “Wetland basins are found throughout most of the proposed project area. Turbines **should not be placed** in or **near wetland basins** and special care should be made to **avoid areas with high concentrations of wetlands.**” (Ex. I-23 p. 3 (emphasis added).)

A review of Figure 11 of the Application shows one of three things: (1) Crocker totally ignored those recommendations;<sup>7</sup> (2) Crocker refused to follow the recommendations; or (3) Crocker could not follow them because the area did not allow for it (i.e., it is not suitable for wind development). The northern part of the project is perhaps the clearest example:

---

<sup>6</sup> Crocker has not even completed its wetland delineation surveys. (Transcript at 182: 21-25.)

<sup>7</sup> Further evidence Crocker totally ignored these recommendations came out during the evidentiary hearing, as one of their environmental experts testified, astonishingly, that the USFWS would be okay with surrounding wetlands with turbines. (Transcript at 201: 6-9.) That testimony directly contradicts USFWS’s recommendations concerning wetlands.



Turbines, access roads, and collection lines are tightly weaved near, around, and between wetlands. And recall, this portion of the project was the *expansion* made in 2016. In other words, despite being told not to place turbines in, near, or between wetlands, Crocker chose to expand the project to an area with an even higher concentration of wetlands. USFWS’s response to this expansion was not surprising, as it noted the expansion “appears to **exacerbate**, rather than alleviate, **direct and indirect risks posed to wildlife**[.]” (Ex. I-25 p. 3 (emphasis added).)

### ***Cropland***

USFWS and SDGFP repeatedly recommended turbines be placed on cropland. (*See, e.g., Exs. I-22, I-23, I-24, I-64.*) Under the current layout, only 24 turbines are sited on cropland—meaning 80% of turbines (and their associated access roads and collection lines) are planned to go elsewhere. (Ex. I-62 at 3-1.) Crocker claims to have “maximized” its use of

cropland. (Transcript at 195: 3-4.) If placing 20% of turbines on cropland is “maximizing” the use of cropland in the project area, that simply demonstrates the project area is not suitable for wind development.

Crocker either ignored the recommendations of USFWS and SDGFP or simply could not follow them due to the constraints imposed by the area not being suitable for wind development—either way, the project should not go forward given the direct and indirect risks posed to wildlife and the environment.

**ii. Crocker Did Not Adequately Mitigate against/for Environmental Risks**

Throughout the Application, Crocker claimed to have mitigated for the environmental risks of the proposed project. It became clear during the evidentiary hearing that Crocker’s claim is totally baseless.

Brie Anderson, one of Crocker’s environmental experts, was questioned extensively about mitigation.<sup>8</sup> She testified that mitigation is only appropriate if a policy requires it. (Transcript at 222: 6-20; 223: 13-20.) The only mitigation-specific policy that exists here is USFWS’s easement exchange process. And because that is the only mitigation-specific policy at play here, according to Crocker no other mitigation measures are necessary or appropriate. (*Id.*) Though, she did note Crocker is willing to pay \$25,000 to help compensate for environmental damage.

Focusing on the USFWS easement mitigation, Crocker has offered to “mitigate” by putting two acres of easement land into the USFWS easement program for each acre of USFWS easement land *permanently* impacted by the project. (Transcript 219: 21 – 221: 10.) Ms.

---

<sup>8</sup> Crocker’s other environmental expert, Joyce Pickle, was not involved in the mitigation process. (Transcript at 279: 23 – 280: 7.)

Anderson testified this 2-to-1 ratio was “accepted” by USFWS and that USFWS is “happy with the ratio[.]” (*Id.*) That is demonstrably false.<sup>9</sup> USFWS recently expressed that “it is apparent that the 2:1 proposed offset ratio (30.2 acres) does not approach the level of mitigation that would compensate for this significant indirect impact to wildlife habitat.” (Ex. I-64 p. 6.) Indeed, USFWS described the 2:1 ratio as “**woefully inadequate**.” (*Id.* at p. 12 (emphasis added).) USFWS also commented on Crocker’s position that no other mitigation is necessary: “Grasslands without easement protections are also valuable for wildlife conservation, thus we recommend inclusion of the entire project area in mitigation planning.” (*Id.* at p. 6.) PUC Staff also still has concerns regarding environmental mitigation. (Transcript 672: 8-10 (“For addressing any potential environmental concerns, I think we still have some concerns around that regarding possible mitigation.”).)

Crocker has also failed to adequately mitigate for wildlife species. The only species for which Crocker is implementing species-specific conservation measures is the whooping crane. (Transcript at 206: 18-24.) Apparently, Crocker has decided that nothing need be done to mitigate the effects to the other seventeen sensitive species recorded in the project area, seven of which are species of greatest conservation need. (Transcript 307: 17 – 308: 21; Ex. A-13-8 p. ii.) Stated succinctly, Crocker’s mitigation efforts and plans, whether for high conservation land areas or for specific wildlife species, remain woefully inadequate.

---

<sup>9</sup> Ms. Anderson also testified that she is not aware of any other states having mitigation policies. (Transcript at 232: 15-20 (Q: . . . are there other states that have policy on mitigation, or where would -- A: I guess related to what? Not that I’m aware of.”); Transcript at 234: 5-7 (Q: And other states don’t have policies either; correct? Is that what you said to me? A: Not that I’m aware of.”).) When pressed further, Ms. Anderson admitted she is in fact aware of policies existing in other states. (Transcript at 245: 10 – 246: 11.)



### iii. Crocker Did Not Adequately Consider Indirect Effects to the Environment

When addressing the effects the proposed project could have on the environment, both in its Application and during the evidentiary hearing, Crocker wanted to focus solely on the direct effects—i.e., the land that would be disturbed. (*See, e.g.*, Transcript at 200: 3-14.) Little in the Application addresses the indirect effects to the environment that would likely result from the proposed project. Indeed, when asked why the Application did not address the indirect impacts to grassland and habitat use, Crocker’s expert explained that it is “because the body of research is small, and it’s inconclusive as to what those impacts actually are.” (Transcript at 227: 1-4.) The expert also testified that “[t]here is a complete analysis of potential indirect impacts, including Loesch and Shaffer and Buhl in the EA. . . . [T]he EA provides a very thorough analysis of indirect impacts.” (Transcript at 218: 10-19.) And when asked why Crocker has not computed or quantified the indirect impacts, both of Crocker’s experts swore, under oath, there is no tool or formula to do so:

Q: From a habitat use perspective, why wouldn’t potential indirect impacts be calculated in addition to the direct impacts?

A: Again, we don’t have a formula for calculating that. And there’s no tool that’s been provided that displays that. . . . It’s not quantifiable.

(Transcript 227: 9-18 (Brie Anderson Testimony).)

Q: . . . Someone asked why Crocker would not measure the indirect impacts to wildlife. Do you remember that question? I think your response was there are no tools to measure the indirect impact to wildlife. Did I understand that testimony correctly?

A: Yes.

(Transcript at 244: 23 –245: 4 (Brie Anderson Testimony).)

Q: Is there anything that allows you to quantify indirect effects to wildlife caused by turbines?

A: That allows us to—what—I guess what I know is there’s some scientific studies that show potentially some amount of displacement. The amount of displacement is not clear. The species—it differs by species, but there’s not clear way that I know of saying here’s what the direct impact is and here’s how we need to calculate it.

Q: Has the U.S. Fish & Wildlife Service proposed or recommended the use of any methodologies to quantify indirect effects?

...

A: Not that—indirect effects have been brought up in conversation. I’m not recalling specific recommendations for how to calculate it.

(Transcript at 290: 2-19 (Joyce Pickle Testimony).)

Of course, we know Crocker’s experts were not being completely forthright or honest. Indeed, USFWS requested Crocker calculate the indirect impacts caused to wildlife as early as May 25, 2017.<sup>10</sup> (Ex. I-49.) Moreover, after reviewing Crocker’s environmental assessment, USFWS expressed dissatisfaction with the lack of attention given to indirect impacts. Specifically, USFWS noted: “Concerted efforts have been made from the beginning of coordination with Crocker to . . . inform them of means to identify and calculate the level of unavoidable direct and indirect impacts on the entire project area[.]” (Ex. I-64 p. 3.) USFWS further noted “it is possible to develop acreage-specific impacts and mitigation plans” and that the “tools” and “methods were provided to Crocker, with the intent they be applied to the Crocker Wind Farm.” (*Id.* at p. 5.) USFWS concluded by remarking:

Despite their apparent utility in determining the level of avian displacement at Crocker and establishing appropriate offsets, these methods are not described in the EA, anticipated indirect impacts of avian displacement are not quantified in the EA, nor is a mitigation plan developed that would adequately offset these impacts.

---

<sup>10</sup> Notably, the email is addressed to Joyce Pickle.

(*Id.*) Stated simply, Crocker failed to adequately consider or calculate the indirect effects to the environment and then misrepresented its ability to calculate those effects to this Commission.

Without calculating the indirect effects and without adequate mitigation, Crocker failed to meet its burden to prove the proposed project will not pose a threat of serious injury to the environment. Thus, the permit application should be denied.

\* \* \*

Crocker has failed to satisfy its burden to prove the project will not pose a threat of serious injury to the environment. The project area is a high wildlife use area that has high conservation value. That is because more than half of the project area consists of wetlands, open waters, undisturbed native prairie, and/or USFWS easement land—areas from which USFWS and SDGFP have consistently recommended avoidance. The completed studies revealed a high number of sensitive species are within the project area. Other studies have not even been completed (e.g., final report of the avian use, ECPG, wetland delineations). Furthermore, Crocker either ignored recommendations provided by SDGFP and USFWS or simply could not comply with them—the most flagrant example of which was Crocker’s failure to consider the indirect impacts the project would have on the environment. Finally, neither of the two environmental experts Crocker had testify had even been to the project area, which certainly calls into question the reliability of their opinions. Given all of this, it is evident Crocker has not proved the project will not pose a threat of serious injury to the environment. *See* SDCL 49-41B-22.

As USFWS stated in its November 29, 2016 correspondence, “[i]n some cases, it is appropriate to abandon project areas due to high risk to wildlife.” (Ex. I-25 p. 2.) This is one of those cases. Frankly, Crocker should have abandoned this project back in 2010 after it was put

on notice of how valuable and sensitive the project area is from an environmental standpoint. Instead, it chose to charge forward with the project and even expand it to more environmentally-sensitive areas, because, after all, there is nothing the USFWS or SDGFP can do to stop the project from going forward. (*See* Transcript at 390: 13 – 391: 3; Transcript at 575: 12-14 (noting the Commission is the regulatory authority, not SDGFP); Ex. I-42 p. 6 (Crocker reminding USFWS that it can suggest mitigation measures but Crocker need not follow them).) Indeed, the only government agency that has the resources and authority to deny this project because of environmental issues is the Commission. Accordingly, Intervenor respectfully request the Commission deny the permit application due the environmental issues addressed herein.

**II. Crocker Failed to Prove the Proposed Project Will Not Pose a Threat of Serious Injury to the Social and Economic Condition of Inhabitants and Will Not Substantially Impair the Welfare of the Inhabitants**

Crocker bears the burden of proving its proposed project will not pose a threat of serious injury to the social and economic condition of inhabitants and will not substantially impair the welfare of the inhabitants. SDCL 49-41B-22. Crocker failed to satisfy its burden.

The area around the project is densely populated for rural South Dakota. There are at least 69 residences within one mile of the project. (Ex. A-9 p. 4.) Thirty-one of those residences are non-participating, many of which are actively opposed to the project. (Ex. I-58 at 4-3 (reference list); *see also* Order Granting Intervention and Party Status.) Crocker failed to prove that the project will not substantially decrease residential property values for those non-participating residences. (*See* Testimony of David Lawrence.) Furthermore, Crocker failed to prove the project will not substantially interfere with a major tourism and recreation activity of the area—pheasant and waterfowl hunting. (Transcript at 568 – 572.) For these additional reasons, the Commission should deny the permit application.

### **III. Denial Is Also Appropriate Because of the Incompleteness of the Application and Because of Crocker's Questionable Conduct**

#### **A. Several Material Questions Remain Unanswered**

Intervenors already touched on the unanswered questions regarding the environment (e.g., avian survey report unfinished; ECPG not complete; indirect effects to the environment; wetland delineations incomplete; NRCS easement land) and will not repeat them here. Those, however, are not the only questions that remain unanswered.

First, there is the issue of cultural resources. Crocker has not even completed the Level 3 Survey or the shovel tests. (Transcript at 352: 10-21.) In fact, 2,700 additional shovel tests are anticipated. (*Id.*) Nor has Crocker reached out to any Native American tribes, despite South Dakota's State Historic Preservation Office's ("SHPO") recommendation that it do so. (Transcript at 358: 9-13.) This is concerning, as SHPO's review and compliance coordinator testified that she would anticipate the project area would contain "a lot of cultural resources, precontact cultural resources." (Transcript at 524: 1 – 525: 4.) And as Ms. Olson responded to a Commission question, "without having the complete information, there's no way for [the Commission] to know if the resources are going to be adequately taken into consideration." (*Id.* at 525:10-13.) Denial is therefore appropriate. *See* SDCL 49-41B-22 (requiring compliance with all applicable laws and rules); SDCL 1-19A-11.1 (not permitting activity which may encroach upon or damage historic property); SDCL 1-19A-2 (definition of "historic property" includes any object or area that is significant in the history, archeology, planetology, or culture of the states, its communities, or nation); 36 C.F.R. § 800 *et seq.*

Next, it became clear very early in the evidentiary hearing there remain questions regarding the size of the project. Crocker has continuously represented to the Commission that the project will be up to 400MW. When corresponding with other agencies, however, Crocker

has represented the project will only be 200MW. (*See, e.g.*, Application, App’x J (EMF Report); Ex. I-45 (memo regarding discussions with USFWS and SDGFP); Ex. I-24 (correspondence from USFWS).)<sup>11</sup> During the hearing, Crocker revealed its intentions that it plans to initially build only 200MW. (Transcript at 19: 10-14.) Apparently, Crocker has always viewed this project as two separate projects: “So they’ve always been organized as Crocker 1 and Crocker 2.” (Transcript at 31: 5-6; *see also* Transcript at 33: 14-16 (“Crocker 1 was a 200-megawatt project. Crocker 2 is another 200-megawatt project adjacent to it.”).) However, Crocker has not distinguished which turbine locations are part of Crocker 1 and which turbine locations are part of Crocker 2. (*Id.* at 31: 15-21.) In other words, it remains a mystery exactly what project Crocker is planning to build, when it will be built, and where.

Also, SDCL 49-41B-22 requires “due consideration” be given to the “views of governing bodies of affected local units of government.” Crocker claimed it has been “coordinating” with local townships that would be affected by the project. Testimony revealed what Crocker considers “coordinating” to mean. The only “coordination” Crocker has had with townships is sending a letter, leaving voicemails, and speaking with the wife of a township chairperson. (Transcript at 378: 4 – 379: 14.) In other words, the evidence presented by Crocker related to the “views of governing bodies of affected local units of government” was minimal and Crocker failed, as is required under SDCL 49-41B-22, to present the Commission with sufficient evidence to give “due consideration” to township views. Indeed, Intervenors conclude, as should this Commission, **no** consideration has been given to the governing bodies of affected townships.

---

<sup>11</sup> Notably, Crocker testified that the project grew from 200MW to 400MW in the “2013-2014 time frame.” (Transcript at 20: 4-6.) No explanation has been offered for why, even after the 2013-2014 time frame, Crocker continued to (mis)represent to other agencies, including USFWS, the project would only be 200MW.

There should not be this many unanswered questions at this stage of the proceeding. Because there are so many and because of the significance of those unanswered questions, the Commission should deny the permit application.

**B. Crocker's Questionable Conduct**

Lastly, Intervenors request the Commission deny Crocker's permit due to Crocker's questionable and, in some cases, underhanded conduct. Intervenors have serious concerns regarding the various representations made by Crocker throughout the development of this project as well as some of the tactics Crocker has used to push this project forward. Several examples exist.

Some examples of Crocker's questionable conduct have already been addressed. Both of Crocker's environmental experts testified under oath that there are no tools available to quantify indirect impacts to the environment. We now know USFWS provided those very tools to Crocker long ago and requested that they be used for the project. But Crocker chose to ignore that request and then act as if it never happened during the hearing. Crocker also represented that USFWS had a good understanding of the ECPG and the methodologies used therein. Again, not true, as USFWS has no knowledge whether Crocker applied appropriate and/or recommended methods. Crocker also testified that USFWS was happy with the 2:1 ratio for mitigation. Of course, USFWS described the 2:1 ratio as "woefully inadequate."

There are other examples as well. For instance, during the evidentiary hearing Crocker's primary spokeswoman, Ms. Schmidt, either had a poor memory or was less than honest regarding whether she had any knowledge that Crocker, at the time it was getting landowners signed up for the project, told potential landowners that turbines would not be placed on

easement lands. (Transcript at 383: 9 – 384: 25.) Of course, now that it has the necessary landowner signatures, Crocker is attempting to place 14 turbines on easement lands.

Next, Crocker's property-value expert claimed he was only able to find one residential property sale near a wind farm in his search. (Ex. A-16 p. 5.) PUC Staff's expert, however, was able to locate several in a single afternoon that raised concerns regarding devaluation. (Ex. S-6 pp. 8-12.)

The National Oceanic and Atmospheric Administration ("NOAA") suggested mitigation strategies to minimize potential interference with the Aberdeen weather radar. In both the Application and Environmental Assessment, Crocker claimed to be implementing those mitigation strategies, yet it is evident the mitigation strategies were ignored. (*See* Ex. I-54 at 150-72.) NOAA also requested Crocker provide project updates going forward. Seeing no evidence of subsequent correspondence with NOAA/Aberdeen Weather Radar in Appendix H of the Application, Intervenors requested copies of the correspondence via a data request. Crocker generally referred Intervenors to Docket EL17-055, wherein Intervenors have not located any continual updates. (Ex. I-61 at 2.1.)

Crocker also repeatedly made exaggerations regarding how a potential condition may impact the project in an effort to prevent the condition from being imposed. For example, in September 2017, Crocker represented to the Commission it had significant concerns about competing in the market under the conditional use permit. (Transcript at 20: 12 – 22: 2.) Even though the conditional use permit remains in effect, Crocker now seemingly has no concerns about its ability to compete in the market. The Commission might recall the previous Docket that contained evidence of Crocker representing to Clark County officials that a  $\frac{3}{4}$  mile setback would basically be unworkable. (*See, e.g.*, EL17-028 10/10/2017 Brief in Support of



Intervenors' Motion to Deny and Dismiss Crocker Wind Farm's Application p. 3 (summarizing said representations).)<sup>12</sup> Yet, Crocker now believes the ¾ mile setback is workable.

In sum, it is apparent Crocker will say almost anything, regardless of the veracity of such statement, to get this project green-lighted. The above examples are limited to only those instances that have been exposed. Intervenors believe there are other instances that have not been brought to light. Regardless, for the foregoing reasons, Intervenors respectfully request the Commission deny the permit application. *See* SDCL 49-41B-33 (allowing for the revocation of a permit for “any misstatement of a material fact in the application or in accompanying statements or studies required of the applicant, if a correct statement would have caused the commission to refuse to grant a permit”).

### **CONCLUSION**

Where Crocker is attempting to build its wind farm simply is not suitable for wind development. That is not the least bit surprising, because Crocker did not even select this location. It is not as if Crocker scouted the South Dakota landscape for a prime location for wind development. Rather, participating landowners are the ones who first approached Crocker about building a wind farm in the area. Once approached, tunnel vision set in—Crocker would do whatever it took to seize this financial opportunity and build a wind farm at this location.

USFWS warned Crocker about the area's unsuitability for wind development in 2010 and encouraged it to examine alternative locations. Moreover, South Dakota law required Crocker to

---

<sup>12</sup> While this was not brought up during the evidentiary hearing, Intervenors believe the Commission is free to consider those matters that were filed in the prior docket as matters of public record.

consider alternative locations.<sup>13</sup> ARSD 20:10:22:12. Nevertheless, Crocker disregarded the warning, refused to consider alternative locations, and charged forward with the project. Not only did Crocker charge forward with the project, it decided to expand the project to an even more environmentally-sensitive area to the dismay of USFWS. It also decided to site turbines on USFWS easement land. Moreover, Crocker is now requesting 1,000 feet micro-siting for turbine placement flexibility to avoid cultural resources, which equates to approximately 72 acres for each turbine. If this area were truly suitable for wind development, Crocker would not need this “flexibility.”<sup>14</sup>

During the evidentiary hearing Crocker testified about balancing various interests—it is clear the environment and cultural resources have consistently taken a backseat to profits. More should be expected and required from developers seeking to build wind farms in South Dakota. For the reasons stated herein, Intervenors respectfully request the Commission deny Crocker’s permit application.

---

<sup>13</sup> South Dakota is a large state. Certainly there are several areas in South Dakota more suitable for wind development than the project area.

<sup>14</sup> When asked about micro-siting and what flexibility would be the most responsible, PUC Staff engineer testified: “The most responsible would probably be zero because then it would afford all parties to review and allow GF&P, SHPO to comment and be included in the process, and it would be the most transparent.” (Transcript 672: 22 – 673: 2.)



## Certificate of Service

The undersigned, one of the attorneys for Intervenor, certifies that a true and correct copy of the foregoing was served on May 29, 2018, via email upon the following persons:

Ms. Mollie Smith  
Fredrikson & Byron, PA  
Attorneys for Crocker Wind Farm, LLC  
[msmith@fredlaw.com](mailto:msmith@fredlaw.com)

Mr. Brett Koenecke  
Ms. Kara C. Semmler  
May, Adam, Gerdes & Thompson, LLP  
Attorneys for Crocker Wind Farm, LLC  
[brett@mayadam.net](mailto:brett@mayadam.net)  
[kcs@mayadam.net](mailto:kcs@mayadam.net)

Ms. Kristen Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
[kristen.edwards@state.sd.us](mailto:kristen.edwards@state.sd.us)

Ms. Amanda Reiss  
Staff Attorney  
South Dakota Public Utilities Commission  
[amanda.reiss@state.sd.us](mailto:amanda.reiss@state.sd.us)

Ms. Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
[patty.vangerpen@state.sd.us](mailto:patty.vangerpen@state.sd.us)

Mr. Darren Kearney  
Staff Analyst  
South Dakota Public Utilities Commission  
[darren.kearney@state.sd.us](mailto:darren.kearney@state.sd.us)

Mr. Jon Thurber  
Staff Analyst  
South Dakota Public Utilities Commission  
[jon.thurber@state.sd.us](mailto:jon.thurber@state.sd.us)

Ms. Melissa Schmit  
Crocker Wind Farm, LLC  
[melissa@geronimoenergy.com](mailto:melissa@geronimoenergy.com)

Ms. Betsy Engelking  
Crocker Wind Farm, LLC  
[betsy@geronimoenergy.com](mailto:betsy@geronimoenergy.com)

Ms. Christine Tarbox  
Auditor  
Clark County  
[christine.tarbox@state.sd.us](mailto:christine.tarbox@state.sd.us)

Ms. Bonnie Fosheim  
Auditor  
Day County  
[bfosheim@daycounty.org](mailto:bfosheim@daycounty.org)

Ms. Theresa Hodges  
Auditor  
Spink County  
Redfield, SD 57469  
[spinkcoauditor@nrctv.com](mailto:spinkcoauditor@nrctv.com)

\_\_\_\_\_  
*/s/ Reece M. Almond*  
Reece M. Almond