

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

**IN THE MATTER OF THE
APPLICATION BY DEUEL HARVEST
WIND ENERGY SOUTH LLC FOR
ENERGY FACILITY PERMITS OF A
WIND ENERGY FACILITY AND A 345-
KV TRANSMISSION FACILITY IN
DEUEL COUNTY, SOUTH DAKOTA,
FOR THE SOUTH DEUEL WIND
PROJECT**

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**STAFF’S POST HEARING BRIEF

EL24-023**

The Commission Staff, by and through its attorneys of record, hereby files this post-hearing brief in the above-captioned siting proceeding:

I. Preliminary Statement.

For purposes of this brief, the South Dakota Public Utilities Commission shall be referred to as the “Commission”; Commission Staff is referred to as “Staff”; Deuel Harvest Wind Energy South, LLC is referred to as “South Deuel” or “Applicant.” Reference to the transcript of the Evidentiary Hearing will be “EH”, followed by the appropriate page number, and prefiled testimony that was accepted into the record will be referred to by its exhibit and page number.

II. Jurisdictional Statement.

The Applicant filed for a permit to construct a wind energy facility and a transmission facility. The Commission has jurisdiction over siting permits for wind energy facilities and transmission facilities pursuant to SDCL Chapter 49-41B. SDCL 49-41B-25 requires the Commission to make “complete findings” in rendering a decision on whether the permit to construct a wind energy facility should be granted, denied, or granted with conditions within nine months of receipt of the initial application. SDCL 49-41B-24 requires the Commission to make

“complete findings” in rendering a decision on whether the permit to construct a transmission facility should be granted, denied, or granted with conditions within twelve months of receipt of the initial application.

III. Statement of the Case and Facts.

On June 28, 2024, South Deuel filed an application for a siting permit, pursuant to SDCL 49-41B-4, to construct the South Deuel Wind Project (Project), a wind energy conversion facility to be located on approximately 29,258 acres of land in Deuel County, in the townships of Blom, Brandt, Clear Lake, Norden, and Scandinavia South Dakota. The total installed capacity of the Project would not exceed 260 megawatts (MW) of nameplate capacity and deliver up to 250 megawatts to the point of interconnection. The proposed Project would include up to 68 wind turbines, electrical collection and supervisory control and data acquisition systems, a 34.5-kV to 345-kV collection substation, an approximately 6-mile long 345 kV generator tie line (Gen-Tie Line), improvements to enable the interconnection of the Project into the existing 345 kV Astoria Interconnection switchyard, an operations and maintenance facility, up to two aircraft detection lighting system towers, access roads, and up to three meteorological towers. The Project will also include temporary construction areas, crane paths, public road improvements, a general construction laydown yard, staging areas, and a concrete batch plant, as needed. The Gen-Tie Line will transmit electricity approximately 6 miles from the collector substation to the point of interconnection at the existing Astoria 345 kV Interconnection switchyard owned by Otter Tail Power Company. The Project is expected to be in commercial operation in December 2026.

Pursuant to ARSD 20:10:22:40, the Commission established a deadline of August 27, 2024, for submission of applications for party status. Matthew Holden, Arla Hamann Poindexter,

Jay Grabow, Josh Bekaert and the Lake Cochrane Improvement Association, Inc., timely submitted applications and were each granted party status by the Commission.

An Evidentiary Hearing was held on January 21, 2025, with Applicant, Staff and Arla Hamann Poindexter appearing.

IV. Statement of the Issues.

The principal issue to be decided in this matter is whether, pursuant to SDCL 49-41B and ARSD 20:10:22, the permit requested by the Applicant for a wind energy facility and Gen Tie Line should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. Additionally, the Commission must determine whether the Applicant has met its burden of proof with respect to each element of SDCL 49-41B-22 for the requested permit.

V. Factors Applicant Must Establish and Burden of Proof.

SDCL 49-41B-22, as in effect July 1, 2019, provides that the Applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility 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 siting area. An application for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been

given the views of governing bodies of affected local units of government. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision.

In addition, the administrative rules state that the Applicant “has the burden of going forward with presentation of evidence....” ARSD 20:10:01:15.01. Therefore, the next question is: What standard shall be applied to determine if the Applicant has met its burden of proof? The general standard of proof for administrative hearings is by preponderance, or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶ 13, 645 N.W.2d 601, 605. It is erroneous to require a showing by clear and convincing evidence. *Dillingham v. North Carolina Dept. of Human Resources*, 132 N.C. App. 704, 513 S.E.2d 823 (1999). “Preponderance of the evidence is defined as the greater weight of evidence.” *Pieper v. Pieper*, 2013 SD 98, ¶ 22, 841 N.W.2d 787 (citation omitted). Black’s Law Dictionary defines preponderance of the evidence as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black’s Law Dictionary (10th ed. 2014).

The South Dakota Legislature has clearly indicated that it intended for the Commission to very carefully and thoroughly scrutinize applications for siting permits. This is evidenced by its enactment of SDCL 49-41B-12, which provides for a deposit and a filing fee to investigate, review, process, and notice the application. Because the Legislature established a fee to support

the investigation into permit applications, it is apparent that the Legislature intended for an extensive and complete review of the application to be conducted. It would not have done so if it did not expect this to be a significant investigation of the required factors. Such a high bar protects the land and the citizens of this state, as well as adds legitimacy to all permit applications that are granted.

VI. Argument and Analysis.

A. Comply with all applicable laws and rules

The Application shows the Project will comply with applicable laws and rules. The Applicant also agreed to include specific conditions to any permit granted by the Commission committing to obtain all governmental permits which reasonable may be required by governmental units for construction and operation activity of the Project prior to engaging in the activity covered by the applicable permit and to construct, operate, and maintain the Project consistent with such permits.¹

There was no evidence offered into the record that Applicant would not comply with all applicable laws and rules.

B. Risk of serious injury to the environment or social and economic condition of inhabitants in the siting area.

a. Environment

Intervenor, Arla Hamann Poindexter, testified that she has concerns about the impact the proposed Project would have on wildlife in the area, particularly as it relates to the diminishing

¹ EH Exhibit A-18 Conditions 1 and 2.

habitat of unbroken grasslands for native prairie species.² Ms. Hamann Poindexter recognized Applicant's commitment not to place towers directly on unbroken grasslands, but argues the close proximity of the towers to grasslands would negatively impact soil health and the benefits grasslands provide to native species.³

However, it is significant to note that Ms. Hamann Poindexter's testimony on this topic was not that of an expert, which can affect the weight the Commission gives to the testimony. During Cross-examination by Applicant, Ms. Hamann Poindexter provided the following responses to questions posed by Ms. Agrimonti:

Q. Arla, I know you have a lot of personal experience that you've offered in your prefiled testimony and your questioning today. Do you have any training or education related to environmental sciences?

A. Not education and training. All of my experience is practical experience on the ground actually doing this for a living.⁴

And

Q. Would it be fair to say that you are not offering expert testimony here today but rather on your personal experiences?

A. My personal experience; however, in the – when regard to ranching and everything affiliated with ranching, I think that I would qualify as an expert.⁵

Applicant introduced into the record multiple scientific studies performed by experts in the field into the record, including a Wetland Delineation Report, 2023 Grassland Assessments, 2021-

² EH Exhibit P-1 pages 4-5.

³ EH Exhibit P-1 pages 4-5.

⁴ EH Transcript page 174 lines 17 to 24.

⁵ EH Transcript page 175, lines 13 to 18.

2021 Large Bird Use Survey, 2023 Raptor Nest Survey, 2022 Bat Acoustic Study, Northern Long-Eared Bat Habitat Assessment, Bird and Bat Conservation Strategy, and a 2023 Protected Butterfly Species Habitat Assessment. Ms. Michelle Phillips testified that third party consultants who are experts in the resources complete the field work.⁶ and that the reports and studies were used to inform siting and routing for the Project.⁷ Additionally, Ms. Phillips testified that the Project has coordinated with state, federal, and local agencies, including the US Fish and Wildlife Service and South Dakota Game, Fish, and Parks (GF&P) to identify potential natural and cultural resources in the vicinity, to share information, and that the Project considered agency input and comments in siting the project and identifying potential turbine locations, including making adjustments to avoid or minimize impacts to unbroken grasslands, wetlands, and other habitats within or near the Project area.⁸

Staff witness Chad Switzer, GF&P, provided testimony explaining that GF&P provided information to Applicant on threatened or endangered species and sensitive environmental areas in or near the project and reviewed Applicant's studies and believed Applicant conducted proper studies to identify potential impacts to the terrestrial environment.⁹ Mr. Switzer has 25 years of experience in wildlife and habitat management along with a formal B.S. in Natural Resources, majoring in Fisheries & Wildlife Management.¹⁰ He also testified about the conservation value of grasslands and GF&P's concern about potential fragmentation of grassland areas.¹¹ GF&P also made recommendations to the Applicant regarding the avoidance of certain grassland areas and

⁶ EH Transcript page 86, lines 13-15.

⁷ EH Exhibit A-5 page 6.

⁸ EH Exhibit A-5 pages 8-9.

⁹ EH Exhibit S-2 page 3-5.

¹⁰ EH Exhibit S-2 page 20.

¹¹ EH Exhibit S-2 pages 5-7 and 11.

made suggestions to Applicant to mitigate impacts where avoidance is not possible, and that fragmentation of grassland habitats were avoided or minimized in some of the project area through the proposed layout of infrastructure.¹² Mr. Switzer testified that Applicant took appropriate measures in avoiding and minimizing impacts to wetlands¹³ and Mr. Switzer also recommended two years of post-construction avian and bat mortality monitoring be a condition to any permit granted.¹⁴

Applicant committed to comply with all mitigation measures set forth in the Application and in responses to staff's data requests, promptly report presence of any unreported/new critical habitat of threatened or endangered species in the Project area, file the Stormwater Pollution Prevention Plan approved by the South Dakota Department of Agriculture and Natural Resources, work with landowner and land management agencies to determine and implement a plan to control noxious weeds, avoid potentially undisturbed grasslands and impacts to documented habitats for listed species when shifting turbines and Gen-Tie Line structures, file and implement a Bird and Bat Conservation Strategy prior to construction and during operation of the Project, establish a procedure to prevent whooping crane collisions, and to undertake a minimum two years of independently conducted postconstruction avian and bat mortality monitoring for the Project.¹⁵ Mr. Switzer testified that the inclusion of these conditions resolved his concerns raised in testimony.¹⁶

Reviewing all of the evidence in the record regarding the environment and giving it the proper weight, Applicant has shown by a preponderance of the evidence that the proposed Project,

¹² EH Exhibit S-2 pages 11-12.

¹³ EH Exhibit S-2 page 13.

¹⁴ EH Exhibit S-2 page 16.

¹⁵ EH Exhibit A-18, Conditions 6, 10, 14, 16, 22, 23, 34, 37, and 46.

¹⁶ EH Transcript page 152, lines 2-4.

including the Gen-Tie Line and applying all proposed conditions in Exhibit A18, will not pose significant harm to the environment.

b. Social and economic condition of inhabitants

SDCL 49-41B-22(2) specifies that “[a]n Applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area[.]” Applicant obtained a conditional use permit for the Project, including the Gen-Tie Line from Deuel County on September 11, 2023.¹⁷ No evidence was proffered that Applicant needed any other conditional use permits for the Project.

Intervenor Arla Hamann Poindexter questioned the economic effect of the Project and whether the Project “will be the boom that the company claims it to be[.]”¹⁸ citing tax record data and other compiled economic data and testified that the addition of the Project will “do little to improve the economy of Deuel County.”¹⁹ She did not present evidence that the Project would have a negative impact on the economic condition of the inhabitants.

However, because Applicant has obtained a conditional use permit from the applicable county, under statute, the Project, including the Gen-Tie Line, is determined not to threaten the social and economic condition of the inhabitants, and no additional Commission consideration or determination regarding this factor is to be made.

C. Health, safety and welfare of the inhabitants

¹⁷ EH Exhibit A-1, Appendix B, page 2-3.

¹⁸ EH Exhibit P-1 page 2.

¹⁹ EH Exhibit P-1 pages 2-4.

SDCL 49-41B-22(3) requires the Applicant show the proposed facility will not substantially impair the health, safety or welfare of the inhabitants.

Noise

Staff Witness David Hessler testified to concerns that a few receptors in the Applicant's Noise Analysis²⁰ have predicted cumulative noise levels above 45 dBA.²¹ In proposed conditions, Applicant agreed to a 45 dBA cumulative sound limit, as well as a specific plan to test actual sound levels emitted from the project if necessary.²² In addition, Applicant agreed to not construct certain turbines unless noise modeling demonstrates that the cumulative noise level is 45 dBA or less at nearby non-participating residences.²³ Mr. Hessler testified that Applicant's agreement to the noise conditions alleviated the concerns he raised in testimony.²⁴

Aerial spraying

In discovery, Staff asked Applicant about its plan for coordinating aerial spraying and asked Applicant to agree to a specific condition to coordinate shutdowns with local agricultural spray applicators.²⁵ In response, Applicant proposed a condition to include a three-step notification process for aerial spraying application in order to coordinate the shutdown of turbines to accommodate spraying.²⁶ Ms. Hamann Poindexter testified that Applicant's proposed notification requirement was concerning because adhering to the proposed notification schedule could cause

²⁰ EH Exhibit A-1, Appendix M.

²¹ EH Exhibit S-1 page 5, lines 1-10.

²² EH Exhibit A-18 Conditions 27.

²³ EH Exhibit A-18 Condition 48.

²⁴ EH Transcript page 146, lines 23-25 and page 147, lines 1-3.

²⁵ EH Exhibit S-4 page 22, DR Response 1-54.

²⁶ EH Exhibit S-4 page 22, DR Response 1-54.

delay in spraying and result in economic harm.²⁷ Applicant did agree to remove the notification schedule from the proposed condition agreed to by Staff and presented in Exhibit A18.²⁸ Ms. Hamann Poindexter testified that this proposed condition alleviated her concern²⁹ and Staff views this issue as resolved with the condition.

Seaplane base

One area of concern that arose through discovery was whether the Project would interfere with the safe usage of the seaplane base on Lake Cochrane, particularly with the location of turbines 21, 22, and 49.³⁰ Applicant testified that the FAA will conduct a full aeronautical study on the turbine locations of concern.³¹ Additionally, Applicant agreed to a condition that it would not construct a turbine at a location that has received a final FAA determination of hazard.³² Staff agreed to this condition and neither Intervenors LCIA nor Matt Holden attended the hearing or put any evidence into the record indicating that this matter was at issue.

Construction noise and traffic

Ms. Hamann Poindexter testified that she was concerned about increased traffic and that the noise associated with construction of the Project may negatively impact her mother's well-being.³³ Ms. Hamann Poindexter testified that her mother, whose residence is one-half mile from a gravel pit intended to be utilized during construction of the Project, suffers from dementia, and

²⁷ EH Exhibit P-1 page 3, paragraph 1.

²⁸ EH Exhibit A-18 Condition 43.

²⁹ EH Transcript page 172 lines 11-15.

³⁰ EH Exhibit A-16 DR response 1-2 and 1-3.

³¹ EH Exhibit A-14 page 18, line 455-463.

³² EH Exhibit A-18, Condition 47.

³³ EH Transcript page 177, line 7 through page 178, line 17.

she is concerned the noise from the gravel pit may negatively impact her mother's condition.³⁴ However, Ms. Hamann Poindexter provided no scientific evidence that would show noise would pose a substantial impact to her mother's health, safety and welfare. Applicant did not present specific evidence on potential impact of construction noise on dementia, however, because there is no evidence in the record that Ms. Hamann Poindexter is a medical professional and because no specific medical evidence was presented into the record to support Ms. Hamann Poindexter's concerns, this testimony should carry limited weight. Further, the Applicant does not anticipate performing significant noise-causing during nighttime³⁵ and will limit any necessary nighttime work near residences to quiet activities and minimize backing up on site of delivery trucks.³⁶

Additionally, Ms. Hamann Poindexter testified that she was concerned that traffic to and from the gravel pit one-half mile from her home may affect the safety of caregivers traveling to her home.³⁷ Ms. Hamann Poindexter further testified that she was aware of a road use agreement between Applicant and Deuel County, but that she does not trust the county to make appropriate conditions on the use of roads.³⁸ However, from Ms. Hamann Poindexter's testimony, the concern with this noise and traffic seems to be limited to the construction phase of the project,³⁹ and will be temporary.

The temporary nature of the construction traffic and noise at the gravel pit, combined with the lack of scientific evidence supporting Ms. Hamann Poindexter's concerns relating to health,

³⁴ EH Transcript page 177, line 11 through page 178, line 6.

³⁵ EH Exhibit S-4 pages 633-634.

³⁶ EH Exhibit A-1 pages 92-93.

³⁷ EH Transcript page 177, line 7 through page 178 line 6.

³⁸ EH Transcript page 178, lines 7-17.

³⁹ EH Transcript page 177, lines 7-10.

safety, and welfare do not support a finding that construction traffic and noise would have a substantial impact on inhabitants in the area.

Considering all evidence in the record, if the conditions proposed in A18 are incorporated into any permit the Commission issues, the Applicant has shown the proposed Project will not substantially affect the health, safety or welfare of the inhabitants in the area.

D. Orderly development of the region

SDCL 49-41B-22(4) specifies “[a]n applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable units of government is in compliance with” the requirement that the proposed facility will not unduly interfere with the orderly development of the region. Applicant obtained a conditional use permit for the Project, including the Gen-Tie Line from Deuel County on September 11, 2023.⁴⁰ No evidence was proffered that Applicant needed any other conditional use permits.

Therefore, under statute, the Project, including the Gen-Tie Line is determined not to unduly interfere with the orderly development of the region. No additional Commission consideration or determination is to be made regarding this factor.

VII. Conclusion.

After the introduction of evidence at the evidentiary hearing, the question before the Commission is: whether it is more likely than not that the Applicant has satisfied each requirement of SDCL 49-41B-22 by a preponderance of the evidence.

⁴⁰ EH Exhibit A-1, Appendix B, page 2-3.

With the inclusion of the proposed conditions set forth in Exhibit A18, it is Staff's opinion that the Project will not pose a significant threat to the health, safety, welfare, or orderly development of the region or the environment. Therefore, Staff recommends the Commission grant the requested permit, subject to the conditions detailed in Exhibit A18.

Respectfully submitted this 14th day of February, 2025.



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