

ORDINANCE NO. 2017-04

AN ORDINANCE PROVIDING FOR THE PLACEMENT, CONSTRUCTION, USE AND MODIFICATION OF WIND ENERGY CONVERSION SYSTEMS CONSISTENT WITH LINCOLN COUNTY'S LAND USE POLICIES; MINIMIZING POTENTIAL NEGATIVE IMPACTS OF WIND ENERGY CONVERSION SYSTEMS; ESTABLISHING A FAIR AND EFFICIENT PROCESS FOR REVIEW AND APPROVAL OF APPLICATIONS, AND REPEALING AND REPLACING ORDINANCE 2011-03.

WHEREAS, pursuant to Section 4-37-1, N.M.S.A. 1978, the Board of County Commissioners of the County of Lincoln is empowered to enact regulations which provide for the safety, preserve the health, promote the prosperity and improve the order, comfort and convenience of the citizens of the County of Lincoln; and

WHEREAS, the Board of County Commissioners of the County of Lincoln finds that wind energy is an abundant, renewable and nonpolluting energy resource and that its conversion to electricity may reduce our dependence on nonrenewable energy resources and decrease the air and water pollution that results from the use of conventional energy sources; and

WHEREAS, the Board of County Commissioners of the County of Lincoln also recognizes that WIND ENERGY CONVERSION SYSTEMS ("WECS") as defined herein, may pose potential concerns to the health, safety, public welfare, character and environment of the County and its inhabitants; and

WHEREAS, it is the intent of the Board of County Commissioners of the County of Lincoln to promote responsible renewable energy economic development that will significantly contribute to the rural economy of the County; and

WHEREAS, it is the intent of the Board of County Commissioners, through the enactment of this Ordinance, to ensure that the placement, construction, use and modification of WECS is consistent with Lincoln County's land use policies; and

WHEREAS, enactment of this Ordinance will minimize potentially negative impacts of WECS, establish a fair and efficient process for review and approval of applications, and assure an integrated, comprehensive review of environmental impacts of such facilities; and

WHEREAS, the Board of County Commissioners finds that this Ordinance is necessary to provide for the safety, health and welfare of the citizens of the County of Lincoln.

NOW, THEREFORE, BE IT ENACTED BY THE PEOPLE OF THE COUNTY OF LINCOLN, NEW MEXICO:

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WIND ENERGY CONVERSION SYSTEMS (WECS) REQUIREMENTS:

Section 1. APPLICABILITY.

This Ordinance shall govern WIND ENERGY CONVERSION SYSTEMS (WECS) or parts thereof located within the boundaries of the County, including privately owned land or land owned by the State of New Mexico or the United States, excluding any land within the limits of any incorporated municipality, (Section 4-37-2 N.M.S.A. 1978).

Once adopted, this Ordinance shall repeal and replace Ordinance 2011-03.

Section 2. GENERAL PROVISIONS.

(A) PURPOSE AND INTENT.

The Board of County Commissioners of Lincoln County finds that wind energy is an abundant, renewable and nonpolluting energy resource and that its conversion to electricity may reduce dependence on nonrenewable energy resources and decrease air and water pollution that results from the use of conventional energy sources. The Board of County Commissioners also recognizes that utility-scale WECS may pose concerns to the health, safety, public welfare, character and environment of the County and its inhabitants. This Ordinance establishes a comprehensive WECS application and permitting process, and is intended to minimize negative impacts of WECS, establish a fair and efficient process for review and approval of applications, assure an integrated, comprehensive review of environmental impacts of such facilities, and protect the health, safety and welfare of Lincoln County and its inhabitants.

(B) TITLE.

This Ordinance shall be known and cited as the Lincoln County Wind Energy Conversion Systems Ordinance.

(C) SEVERABILITY.

If any word, phrase, sentence, part, section, subsection, or other portion of this Ordinance or any application thereof to any person or circumstance is declared void, unconstitutional or invalid for any reason, then such word, phrase, sentence, part, section, subsection or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this Ordinance and all applications thereof, not having been declared void, unconstitutional, or invalid, shall remain in full force and effect.

Section 3. FINDINGS.

All forms of development, including WECS, have the potential to negatively impact County resources and the environment through the introduction of contaminants and surface disturbance, which can lead to habitat degradation, fragmentation, and loss as well as degraded qualities of air, soil, and water. This Ordinance is designed to allow for the responsible development of WECS to effectively utilize the

County's wind resources and, significantly contribute to the rural economies of the County, while ensuring the minimum possible impact on the environment and fulfilling the Board of County Commissioners interest of protecting the health and welfare of County residents.

The Board of County Commissioners hereby finds, declares, and determines that this Ordinance:

- (A) Promotes the health, safety, and welfare of the County, its residents, and its environment by regulating potentially adverse impacts and effects resulting from the placement, transportation, construction, and operation of WECS;
- (B) Protects traditional communities and traditional lifestyles, as defined in the Lincoln County Comprehensive Plan;
- (C) Prevents the occurrence of adverse effects and impacts resulting from the abandonment of WECS, or portions thereof within the County;
- (D) Protects the rights of property owners;
- (E) Protects the ecosystem of the County, which is of significant value to the citizens of the County and State;
- (F) Allows for the responsible and economically feasible development of WECS resources;
- (G) Protects the County's historic, cultural, archaeological, water and other natural resources;
- (H) Implements the goals and objectives of, and is otherwise in accordance with, the County's Comprehensive Plan; and
- (I) Attains the foregoing objectives while also promoting the efficient and appropriate development of the WECS industry in the County.

Section 4. NO STATE OR FEDERAL PRE-EMPTION.

This Ordinance is supplementary to, and does not replace any applicable federal or state statutes, including but not limited to, the:

- (A) Water Quality Act, N.M.S.A. 1978, §§ 74-6-1 *et seq.*;
- (B) Solid Waste Act, N.M.S.A. 1978, §§ 74-9-1 *et seq.*;
- (C) Rangeland Protection Act, N.M.S.A. 1978, §§ 76-7B-1 *et seq.*;
- (D) Emergency Planning and Community Right To Know Act, 42 U.S.C.A. §§ 11001 *et seq.*;
- (E) New Mexico Public Health Act, N.M.S.A. 1978 §§ 24-1-1 *et seq.*;
- (F) Wildlife Conservation Act, N.M.S.A. 1978, §§ 17-2-37 *et seq.*;
- (G) Cultural Properties Act, N.M.S.A. 1978, §§ 18-6-1 *et seq.*;
- (H) National Historic Preservation Act, 54 U.S.C.A §§ 300101 *et seq.*;
- (I) Prehistoric and Historic Sites Preservation Act, N.M.S.A. 1978, §§18-8-1 *et seq.*;
- (J) Cultural Properties Protection Act, N.M.S.A. 1978, §§ 18-6A-1 *et seq.*;
- (K) Archaeological Resources Protection Act, 16 U.S.C.A. §§ 470aa *et seq.*;
- (L) Energy Policy Act, 42 U.S.C.A. §§ 6201 *et seq.*;
- (M) Endangered Species Act, 16 U.S.C.A. §§ 1531 *et seq.*;
- (N) Migratory Bird Treaty Act, 16 U.S.C.A. §§ 703 *et seq.*;
- (O) Environmental Protection Act, 42 U.S.C.A. §§ 4321 *et seq.*;
- (P) Bald and Golden Eagle Protection Act, 16 U.S.C.A. §§ 668 *et seq.*;
- (Q) Environmental Improvement Act, N.M.S.A. 1978, §§ 74-1-1 *et seq.*;
- (R) Air Quality Control Act, N.M.S.A. 1978, §§ 74-2-1 *et seq.*;
- (S) Hazardous Waste Act, N.M.S.A. 1978, §§ 74-41 *et seq.*;

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- (T) Ground Water Protection Act, N.M.S.A. 1978, §§ 74-6B-1 *et seq.*; and
(U) Endangered Plants Act, N.M.S.A. 1978, §§ 75-6-1 *et seq.*

All WECS shall meet or exceed standards and regulations of any federal or state government agency with the authority to regulate WECS.

Section 5. PERMIT REQUIRED.

No person shall begin the Major Construction Activities or operation of a WECS within Lincoln County without first being issued a WECS Site Permit by the Board of Commissioners. A person may undertake Minor Construction Activities so long as such person meets with the County to discuss such Minor Construction Activities, receives approval of the Minor Construction Activities from the County and enters into a Road Repair Agreement with the County.

Section 6. DEFINITIONS.

For purposes of this Ordinance, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations and their derivations shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number and words in the singular number include the plural number. The word “shall” is always mandatory, and not merely directory.

As used in this Ordinance, the following terms shall have the meaning indicated:

Affected Landowner shall mean the Person who owns the land upon which a portion of the WECS is or will be located.

Applicant shall mean the Person who applies for a WECS Site Permit pursuant to this Ordinance.

Board of Commissioners shall mean the Lincoln County Board of County Commissioners.

Collection Lines shall mean WECS electrical lines transmitting electricity from the Commercial Wind Turbines, generally having a voltage of sixty-nine (69) kilovolts (kV) or less and WECS communications lines transmitting voice and/or data from the Commercial Wind Turbines; both of which are generally located underground unless site-specific conditions warrant above ground design.

Commercial Wind Turbine shall mean a Wind Turbine with a total height greater than 75 feet and a nameplate capacity of greater than 100 kW.

Construction means any clearing of land, excavation, construction of transportation and access routes to the WECS site, including any road work associated with the construction of the WECS.

County shall mean the County of Lincoln.

FAA shall mean the Federal Aviation Administration.

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Feeder Lines shall mean overhead WECS electrical lines, transmitting electricity with a voltage greater than sixty-nine (69) kV and less than two-hundred thirty (230) kV.

Haul Roads shall mean the roads that will be used during the construction, operation, and maintenance of the WECS to deliver heavy equipment, including but not limited to, tower components, concrete, rotors, turbines, nacelle assemblies, and transformers.

Height shall mean, when referring to a Wind Turbine, the distance measured from ground level to the highest tip of the blade when in a fully vertical position.

High-Voltage Transmission Line shall mean any electrical line designed for or capable of operation at a nominal voltage of two hundred thirty kilovolts (230kV) or more.

MET Tower shall mean a meteorological tower used for the measurement of wind speed.

Major Construction Activities shall mean construction beyond Minor Construction Activities, including but not limited the clearing of significant quantities of land, excavation throughout the entire WECS site, the pouring of structural grade concrete, foundation work that involves rebar, construction of transportation and access routes to the WECS site, including any road work associated with the construction of the WECS, but does not include Minor Construction Activities.

Minor Construction Activities construction activities at the WECS project site that may be undertaken for the purpose of preserving eligibility for certain benefits such as Production Tax Credits, to include activities such as blading or constructing small quantities of access roads within the WECS project site or excavating of 20% of the planned Turbine foundations and pouring of associated “mud mats,” but does not include Major Construction Activities.

Permittee means the person to whom a WECS Site Permit is issued or transferred pursuant to this Ordinance.

Person shall mean an individual, partnership, limited liability company, joint venture, private or public corporation, association, firm, public service company, cooperative, political subdivision, municipal corporation, government agency, public utility district, or any other legal entity, public or private, however organized.

Planning Department shall mean the Lincoln County Planning Department.

Private Wind Turbine shall mean a Wind Turbine with a height of less than seventy-five (75) feet, capable of generating 100kW or less, and used primarily for on-site consumption of power.

Qualified Assignee shall mean (a) an affiliate of the Permittee, (b) any person or entities (i) having a net worth of at least Five Million Dollars (\$5,000,000) including the net worth of any such entity’s parent or parents, and (ii) having experience of its own, or through an affiliate, developing, constructing, owning or managing at least two hundred (200) MW of wind energy generation facilities, or (c) a lender who has engaged a manager or other party meeting the qualifications of (b)(i) and (b)(ii) above.

Road Superintendent shall mean the Road Superintendent for Lincoln County.

Wind Energy Conversion Systems (WECS) shall mean an electricity generating facility consisting of one or more Commercial Wind Turbines under common ownership, operation, or control, and includes related on-site structures such as substations, MET Towers, cables/wires and other buildings accessory to such facility, whose main purpose is to supply electricity to off-site customers(s), but does not include the High-Voltage Transmission Line(s) (electrical lines of 230 kV or greater) used for the transmission and distribution of the generated electricity or Private Wind Turbines.

Wind Turbine shall mean a power generating device that converts wind energy into electricity, which may be comprised of a tower, generator, nacelle assembly, rotor, padmount transformer, switchgear, base, and pad.

WECS Owner is a person who owns a controlling interest in the WECS or the WECS development project.

WECS Site Permit is a permit issued by the Board of Commissioners upon compliance with standards of this Ordinance.

Section 7. MITIGATION MEASURES.

The following mitigation measures shall be implemented within the WECS project footprint to the extent it is reasonably practicable for the Permittee or WECS Owner to do so and as long as such measures are not otherwise negotiated, addressed or waived in a private land use agreement and including any agreement with the State of New Mexico.

- (A) **Site Clearance.** The Permittee shall use reasonable efforts to limit the amount of ground disturbance and clearing to the amount necessary to assure suitable access for construction, safe operation and maintenance of the WECS.
- (B) **Topsoil Protection.** The Permittee shall use standard construction practices to protect and segregate topsoil from subsoil in cultivated lands during construction of the WECS.
- (C) **Compaction.** Except where otherwise required by the engineering design of the WECS system, the Permittee shall use standard construction practices to minimize the amount of compaction within the WECS footprint during all phases of the WECS's life.
- (D) **Livestock Protection.** The Permittee shall take reasonable precautions to protect livestock during all phases of the WECS's life.
- (E) **Fences and Cattle Guards.** The Permittee shall promptly replace or repair all fences, cattle guards, and gates removed or damaged during all phases of the WECS's life.
- (F) **Use of Public Roads.**
 - (i) Prior to commencement of Major or Minor Construction Activities the Applicant or WECS Owner shall identify all state and county public roads within the County to be used to transport

equipment, parts, or materials for construction, operation or maintenance of the WECS.

(ii) The Applicant and the County shall enter into a Road Repair Agreement substantially in the form attached hereto as Exhibit A.

(iii) The Road Superintendent, or a qualified third-party engineer reasonably acceptable to both the County and the Applicant and paid for by the Applicant, shall document the condition of the identified roads prior to construction. The Road Superintendent or third-party engineer shall document road conditions again thirty (30) days after the construction is complete.

(iv) The Applicant or WECS Owner shall demonstrate, to the satisfaction of the County that it has the financial resources sufficient to comply with subsection (v), below, and the County may require the Applicant to post a bond or other security in order to ensure such compliance.

(v) Any road damage caused by the Applicant, WECS Owner, or their contractors shall be promptly repaired at the Applicant's expense in accordance with the Road Repair Agreement.

(G) **WECS Access Roads.** Construction of turbine access roads shall be reasonably minimized. Access roads shall be low profile roads, so that equipment can cross them and shall be covered with gravel or similar material approved by the Road Superintendent. Caliche at a depth consistent with standard construction practices shall be installed at Permittee's expense upon any newly constructed WECS access roads. When access roads are constructed across streams and drainage ways, the access roads shall be designed in a manner so that runoff from the upper portions of the watershed can readily flow to the lower portion of the watershed.

(H) **Private Roads.** The Permittee shall promptly repair private roads or lanes damaged when moving equipment or materials or when accessing the site, unless otherwise negotiated with the Affected Landowner.

(I) **Control of Dust.** The Permittee shall utilize standard construction practices to control dust.

Section 8. SETBACKS.

Commercial Wind Turbines shall meet the following minimum setback requirements:

(A) Distance from existing residences, business and public buildings that are outside the Affected Landowner's property shall be one thousand (1,000) feet. Distance from Affected Landowner's residence, business, or other buildings shall be one thousand (1,000) feet, unless waived or a different setback is agreed in writing by the Affected Landowner.

(B) Distance from any property line of a property that is not a part of the WECS project site shall be 500 feet or one point one (1.1) times the height of the Wind Turbines, whichever is greater, unless a wind easement or waiver of setback has been obtained from the adjoining property owner(s). No setback from internal property lines of an Affected Landowner shall apply.

(C) Distance shall not be closer to any public road or other public ROW than 500 feet or one point five

(1.5) times the height of the Wind Turbines, whichever is greater.

For the purposes of this Section 8, setback distances shall be measured from the center of the tower of a Wind Turbine to (i) the applicable property boundary, or (ii) to the centerline of the applicable County ROW or public road.

Section 9. LINES, INTERFERENCE, AND FOOTPRINT.

(A) **Electromagnetic Interference.** The Permittee shall not operate the WECS so as to cause microwave, television, radio, or navigation interference contrary to Federal Communications Commission (FCC) regulations or other Federal law.

(B) **Footprint Minimization.** The Permittee shall in its design and construction of the WECS make reasonable efforts to minimize the amount of land that is impacted by the WECS while giving due regard to industry and manufacturer standards for Wind Turbine spacing and optimization of energy production. Permittee will also make reasonable efforts to locate associated WECS facilities such as electrical/electronic boxes, transformers and communication systems near the Wind Turbine towers or inside the towers as appropriate or as otherwise agreed with the Affected Landowner.

(C) **Electrical Cables.** The Permittee shall place Collection Lines located on private property underground, unless such treatment is not commercially reasonable. Collection Lines may be placed above ground when conditions warrant, due to subsurface or topographical conditions. Permittee shall also use commercially reasonable efforts to locate Collection Lines within or immediately adjacent to the land necessary for WECS access roads unless otherwise negotiated with the Affected Landowner. This paragraph does not apply to Feeder Lines.

(D) **Feeder Lines.** The Permittee may place Feeder Lines on public rights-of-way if a public right-of-way exists. If no public right-of-way exists, the Permittee may place Feeder Lines on private property. When placing Feeder Lines on private property, the Permittee shall place the Feeder Lines in accordance with the easement negotiated with the Affected Landowner.

Section 10. DECOMMISSIONING/RESTORATION/ABANDONMENT.

(A) **Decommissioning Plan.** Prior to commencement of construction of the WECS, the Permittee shall submit to the Planning Department a decommissioning plan describing the manner in which the Permittee anticipates decommissioning the WECS in accordance with the requirements of paragraph (B) below.

(B) **Disposition.** The Permittee shall submit a plan describing the intended disposition of the WECS at the end of its useful life, and shall provide either (i) excerpted language from any agreement with the Affected Landowner regarding equipment removal upon termination of that agreement to the extent permitted by confidentiality restrictions, or (ii) certification that the Permittee has provided or agreed to such equipment removal provisions. In the event that there is no agreement with the Affected Landowner to post a surety bond or other financial security to secure Permittee's restoration obligations to the Affected Landowner, Permittee plan shall also include provisions requiring Permittee at a time ten (10) years after the commencement of commercial operations of the WECS, to post a surety bond or other financial security reasonably acceptable to the County, in favor of the Affected Landowner(s) not

otherwise covered by a separate agreement, in accordance with industry standards, in an amount sufficient to fund the decommissioning plan and to remove all improvements installed by Permittee and to restore the land in accordance with this Ordinance and any agreements with the Affected Landowner(s) for which security is not otherwise required to be posted. The amount of the security instrument shall be conclusively determined at Permittee's cost by a duly qualified and independent third party mutually acceptable to Permittee and the County and familiar with WECS and shall consider, among other things, scrap or reuse value and inflationary and cost escalation to the date of estimated removal. The value of the security instrument shall be reviewed and updated on or before every fifth anniversary of the initial posting of the surety bond or other financial security. In the event that Permittee does not fully perform the decommissioning plan, including all removal and reclamation of the land, within two years of the cessation of commercial operations or abandonment of the WECS, whichever may come first, the proceeds of the security instrument necessary for the performance of the decommissioning plan shall be paid to the County and/or the Affected Landowner to be used exclusively for the performance of the decommissioning plan, the costs of recovering such funds, and any other cost of the reclamation of the affected lands. Failure to generate electricity in commercial quantities for a period of one year shall be considered to constitute cessation of commercial operations unless the Permittee can show good cause for such failure, such as force majeure, or unresolved technical issues or other similar circumstances outside of Permittee's control, and can present a good faith plan to resume commercial operations within a time reasonably acceptable to the County.

(C) **Site Restoration.** Upon termination of the WECS Site Permit, upon abandonment of the WECS, or upon the voluntary permanent cessation of commercial operations of the WECS, the Permittee shall dismantle and remove from the WECS site all towers, turbine generators, transformers, overhead and underground cables, foundations, buildings and any other ancillary equipment or improvements to a depth of three (3) feet below grade unless otherwise agreed with the Affected Landowner. To the extent reasonably possible the Permittee shall restore and reclaim the WECS site to its pre-WECS topography and topsoil quality. All access roads shall be removed unless written approval is given by the Affected Landowner requesting that one or more roads, or portions thereof, remain. Any agreement with an Affected Landowner for removal to a lesser depth or for no removal at all shall be recorded with the County Clerk's Office and shall show the locations of all such foundations. All such agreements between the Permittees and the Affected Landowner shall be submitted to the Planning Department prior to completion of restoration activities. The WECS site shall be restored in accordance with the requirements of this condition within eighteen months after termination of the WECS Site Permit, abandonment of the WECS, or the voluntary permanent cessation of commercial operations, whichever comes first.

(D) **Abandonment of Commercial Wind Turbines.** The Permittee shall advise the Planning Department of any Commercial Wind Turbines that are abandoned prior to termination of operation of the WECS. Lincoln County may require the permittees to decommission any abandoned Commercial Wind Turbines as described in (B) and (C) above.

Section 11. TOWERS, VISUAL APPEARANCE, LIGHTING, AND POWER LINES.

The Permittee shall use measures to reduce the visual impact of wind turbines to the extent possible, utilizing the following:

(A) Commercial Wind Turbines shall be mounted on industry standard towers and painted an industry standard color. The appearance of Commercial Wind Turbines, towers and buildings shall be maintained throughout the life of the WECS pursuant to industry standards (i.e., condition of exterior paint, signs, landscaping, etc.). Permittee shall submit to the Planning Department a licensed engineer's signed statement or acknowledgment confirming that the construction and installation of the WECS is consistent with industry standards prior to the WECS commencing commercial operations.

(B) The design of the WECS buildings and related structures shall, to the extent commercially reasonable, use materials, colors, textures, screening and landscaping that will blend the WECS's components with the natural setting and then existing environment.

(C) WECS shall not be artificially lighted, except to the extent required by the FAA or other applicable authority, or otherwise necessary for the reasonable safety and security thereof.

(D) Wind Turbines shall not be used for displaying any advertising except for reasonable identification of the manufacturer or operator of the WECS.

(E) Collection Lines shall be placed underground within the interior of each parcel at a depth designed to accommodate the existing agricultural land use to the maximum extent practicable. Collection Lines may be placed overhead adjacent to County roadways, near substations or points of interconnection to the electric grid or in other areas as necessary.

Section 12. SOUND.

Sound level of the WECS shall not exceed 55 dBAs, including constructive interference effects, as measured at existing residences, businesses, and public buildings outside the boundaries of the Affected Landowner's property.

Section 13. SAFETY.

(A) All WECS wiring shall comply with all applicable safety and stray voltage standards.

(B) Commercial Wind Turbines shall not be climbable on the exterior.

(C) All access openings or doors to Commercial Wind Turbines and electrical equipment shall be locked.

(D) Permittee shall submit to the Planning Department a plan describing the type and location of emergency or other safety-related signage to be installed within the WECS site.

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

(F) The Permittee shall submit a copy of the WECS site plan described in Section 19 (A)(3) of this Ordinance to the local fire department and/or the County Emergency Services Director prior to

commencing commercial operations.

(G) Upon request by either of the local fire department and the County Emergency Services Director, the Permittee shall cooperate with the relevant agency to develop any emergency response plan for the WECS, including any training or providing of local fire departments with the necessary information to mitigate Wind Turbine fires, and/or any other type of potential fires or emergencies that may arise during the operation of a WECS.

(H) Nothing in this section shall alleviate the need to comply with any and all other applicable local and state fire or safety laws and regulations.

(I) The Permittee shall maintain a current general liability insurance policy covering bodily injury and property damage with limits of at least \$1 million per occurrence and \$2 million in the aggregate, and shall provide proof of said insurance to the County.

Section 14. PERMIT EXPIRATION.

Except to the extent specified in this Ordinance, a WECS Site Permit does not expire or become void. A WECS Site Permit shall become void if no substantial construction has been completed within three (3) years of issuance. The Board of County Commissioners may grant an extension to the original WECS Site Permit of an additional three (3) years, upon written request from the Permittee and upon a showing of good cause for such failure, such as force majeure or unresolved technical issues.

Section 15. TRANSFER OF PERMIT.

A Permittee shall have the right to assign or transfer the WECS Site Permit to any Qualified Assignee acquiring the WECS project, provided, however, that the Qualified Assignee to whom the WECS Site Permit is assigned or transferred has agreed in writing to assume all of the Permittee's responsibilities under the WECS Site Permit. Prior to the assignment or transfer of a WECS Site Permit, the Permittee shall give notice of the assignment or transfer to the County Manager along with sufficient documentation to satisfy the County that the assignee or transferee is a Qualified Assignee. The assignment or transfer of a WECS Site Permit shall be approved by the Board of County Commissioners prior to such assignment or transfer.

Section 16. VARIANCES.

Where, in the case of a particular proposed application, it can be shown that strict compliance with the requirements of this Ordinance would result in a substantial or unreasonable hardship to the Permittee because of exceptional topographic, soil or other surface or subsurface conditions, or that strict compliance with this Ordinance would result in inhibiting the achievement of the objectives of this Ordinance, the Board of Commissioners may recommend modification or waiver of the standards, or be willing to examine the variation request on a case-by-case basis. No variance shall be granted simply because the Permittee disagrees with or does not wish to meet the goals and objectives of this Ordinance. Also, no variance shall be granted contrary to the mandatory requirements of federal or state law. Requests for variances must be submitted in writing.

Variance requests shall be reviewed by the Board of Commissioners at a regular or special meeting. Variance requests may also be examined by the County department with expertise relating to the subject of the requested variance. Variances may be granted for time periods and under conditions consistent with reasons for granting them.

Section 17. FAILURE TO ACT.

If the Board of Commissioners does not act upon a WECS Site Permit application within forty-five (45) days of the County's determination that the application is complete, the Permittee shall give the Board of Commissioners written notice of its failure to act. If the Board of Commissioners fails to approve or reject the application within thirty (30) days after that notice, the Board of Commissioners shall, upon demand by the Permittee, issue a statement stating that the WECS Site Permit has been approved. Approval will be conditioned on the subsequent receipt of required information as outlined in Section 19(B) below that may not be available at the time the application is submitted.

Section 18. PERMIT APPLICATION PROCEDURES.

An application for a WECS Site Permit must be submitted to the Planning Department on the form prescribed by the Planning Department. An application for approval of a WECS Site Permit must include text and maps sufficient to show that the proposed WECS will comply with the required standards in this Ordinance and the laws of the State of New Mexico. If the Planning Department determines that the application is incomplete, the Applicant may be required to submit additional information. The Planning Department will give notice to the Applicant when the application is determined to be complete. Once an application is determined to be complete, it will be reviewed by the Board of Commissioners at a regular meeting.

No Major Construction Activities associated with a WECS may commence until a WECS Site Permit has been issued by the Board of Commissioners.

Application Fee. Fees for the WECS Site Permit will be \$1,000 plus \$250 for each proposed wind turbine up to a total amount of no more than \$10,000, independent of any other fees applicable to WECS throughout the County.

The County may ask the Permittee to enter into a Cost Reimbursement Agreement to cover any out of pocket expenses incurred by the County to review any materials associated with the WECS Permit application process or any WECS Permit variance requests or to ensure compliance with this Ordinance, including but not limited to the reasonable costs of consultant and expert evaluation and consultation with the County. Such Agreement may include the requirement for an advancement of funds for such uses.

Section 19. REQUIRED INFORMATION FOR PERMIT APPLICATION.

- (A) The following must be submitted with an application for a WECS permit:
- (1) Boundaries of the site proposed for the WECS and associated facilities located in the County on a preliminary ALTA survey or map as appropriate.
 - (2) Map of currently occupied residential structures, businesses, and public buildings on the proposed

site within the County, and within 1000 feet of the site boundaries.

- (3) Site plan showing the general layout of the WECS (including the location of any planned Collection Lines, Feeder Lines, and transmission lines), associated access roads located in the County, depicting lands under agreement with Affected Landowners, and showing the required setbacks from property lines, existing structures, utility lines, and public street rights-of-way. Permittee must give notice to the Planning Department of any (a) changes to the location of Wind Turbines that are greater than one-hundred (100) feet, (b) changes to the location of roads or above ground collection lines (if applicable) that are greater than one-thousand two-hundred (1,200) feet, (c) changes in the location of any above ground feeder lines (if applicable) that are greater than one-thousand (1,000) feet, or (d) changes in the location of any substations, operations buildings, or other above-ground structures that are greater than eight-hundred (800) feet. Such notice shall confirm that such changes do not result in any noncompliance with this Ordinance. Any changes in location that are no longer in compliance with this Ordinance will require a variance. Any changes in location that are greater than the distances set forth above, but still in compliance with this Ordinance will not require a variance, but may require an amendment to the WECS Site Permit depending on the circumstances of the location change.
 - (4) Location of other WECS within ten (10) miles of the proposed WECS site that are being developed by the Applicant or that the Applicant is aware of through publicly available information.
 - (5) A schedule for the proposed start and completion dates of construction of the WECS.
 - (6) Copies of letters notifying local Military Installations (White Sands Missile Range; Holloman, Kirtland, and Cannon Air Force Bases) that a WECS Site Permit has been applied for with Lincoln County and, to the extent Permittee is not prohibited by confidentiality agreements, any applicable permits or approvals the Applicant has received from or related to any locally affected Military Installations.
 - (7) A copy of any Determinations of No Hazard issued by the Federal Aviation Administration for the WECS located in the County.
 - (8) Proof the Permittee has the general liability insurance required under this Ordinance. If the WECS Site Permit is approved, Permittee shall provide proof of insurance to the Planning Department annually.
 - (9) Manufacturer description of the WECS Wind Turbines planned to be installed in the County, including but not limited to, model number, nameplate, hub height, and blade length.
 - (10) Copies of any crossing agreements entered into by the Permittee. Redacted versions of crossing agreements are acceptable, if confidentiality provisions in the crossing agreements would otherwise be breached.
 - (11) Copies of the Memoranda of Agreements with Affected Landowners filed in the County records.
- (B) The following materials must be submitted to the Board of Commissioners within thirty (30) days after receipt by the Applicant. These materials shall be a condition subsequent of any approved WECS Site Permit.
- (1) Copies of building permits associated with the WECS construction within the County.
 - (2) As-built surveys within thirty (30) days from the date the WECS commences commercial operations.
 - (3) To the extent not previously provided in copies of building permits, a copy of the signed engineering plans for the WECS.

Section 20. PENALTIES.

Any person who violates any of the provisions of this Ordinance shall be punished by a fine of up to three hundred dollars (\$300) and/or imprisonment of no more than ninety (90) days, or both. Each day this Ordinance is violated shall be considered a separate offense. In addition, the County may suspend or revoke a WECS Siting Permit if the Permittee violates any of the provisions of this Ordinance or fails to fulfill any conditions subsequent to any approved WECS Siting Permit.

Section 21. NOTICE AND OPPORTUNITY TO CURE

Prior to any remedies being sought or exercised by the County for any default or alleged default by Permittee of any of the provisions of this Ordinance, the County shall first deliver to Permittee a written notice specifying the default and indicating the curative action needed and Permittee shall have a period of fifteen (15) business days after such notice to cure any default that can be cured by the payment of money and a period of thirty (30) business days to cure any other default hereunder; provided, however, so long as Permittee has commenced curative actions within such thirty (30) business day period and thereafter diligently pursues such curative action, such thirty (30) business day period shall be extended for such period of time as may be necessary for Permittee to cure the default. Permittee shall provide County with its proper notice address for this purpose and for any notices delivered under Section 22 below.

Section 22. NOTICES


Except as expressly set forth to the contrary in this Ordinance, all notices, requests or deliverables under this Ordinance must be in writing and must be delivered to the County Manager or Permittee, as applicable, in person, by courier or certified mail, return receipt requested, or by facsimile or other electronic transmission. A notice, request or deliverable given under this Ordinance is effective on receipt by the County Manager or Permittee, as applicable; provided, however, that a facsimile or other electronic transmission that is transmitted after the normal business hours of the recipient shall be deemed effective on the next business day. All notices, requests and deliverables to be sent to the County Manager or Permittee, as applicable, must be sent to or made at the addresses separately provided.

BOARD OF COUNTY COMMISSIONERS
OF LINCOLN COUNTY, NEW MEXICO

PASSED, APPROVED, and ADOPTED this 17th day of October ^{RB}~~September~~, 2017.

BOARD OF COUNTY COMMISSIONERS
OF LINCOLN COUNTY, NEW MEXICO


Preston Stone, Chair


Dallas Draper, Vice Chair

Elaine Allen

Elaine Allen, Member

Thomas F. Stewart

Thomas F. Stewart, Member

Lynn Willard

Lynn Willard, Member

Attest:

Rhonda Burrows

Rhonda Burrows, Lincoln County Clerk



LINCOLN COUNTY-NM
RHONDA B BURROWS, CLERK
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EXHIBIT A TO LINCOLN COUNTY WIND CONVERSION SYSTEMS ORDINANCE
AGREEMENT FOR REPAIR OF LINCOLN COUNTY, NEW MEXICO ROADS
BETWEEN THE COUNTY OF LINCOLN, NEW MEXICO
AND

This Agreement (Agreement) dated as of the date appearing on the signature page hereof, will confirm the agreements between _____ whose address is _____ together with its successors and assigns ("Contractor"), and Lincoln County, New Mexico ("County") whose address is P.O. Box 711, Carrizozo, New Mexico 88301, each a "Party" and together, the "Parties", regarding the use, improvement and repair by Contractor of certain roads situated in Lincoln County in connection with the construction of an electrical transmission line (AND/OR wind farm) project described herein ("Project"). This Agreement supersedes any prior discussion and is intended to establish a general basis of understanding, operations and agreement between the Parties hereto.

PREAMBLE

WHEREAS, Contractor is developing a _____ long transmission line (AND/OR wind farm) located primarily in Lincoln County, New Mexico; and,

WHEREAS, Contractor wishes to make deliveries of materials and components to, and to allow for the construction of the Project; and,

WHEREAS, Contractor may wish to make certain improvements, temporary modifications or realignments of County roads to permit delivery or movement of oversized Project equipment and components.

NOW, THEREFORE, IN CONSIDERATION of the undertakings and agreements hereinafter expressed by the Parties, the County and Contractor mutually covenant and agree as follows:

Section 1. Development Schedule

It is the intention that construction of the Project will start on or after _____. The Project is expected to be commercially operational by _____.

Section 2. Primary Haul or Use Routes

The Project is expected to potentially access a number of routes, and will include a primary haul or use route from one of either: NM Highway 70, NM Highway 380, NM Highway 246, NM Highway 48, NM Highway 37, NM Highway 247, NM Highway 54 or _____. Primary haul or use routes shall be approved by the County Manager or designee prior to the Contractor's initiation of construction of the Project.

Section 3. Use and Repair of County Roads

- A. Exhibit A attached hereto shows the roads that are to be used by Contractor in connection with the Project. Contractor agrees it will only use the portions of the roads that are shown on the attached Exhibit A in connection with the Project.
- B. Subject to provisions of Section 3(C) below, Contractor's obligations with respect to repair or restoration of County Roads will only apply to roads actually used by Contractor or any subcontractor in connection with the Project as indicated in Exhibit A. The Parties may amend Exhibit A from time to time to add roads thereto or to make other adjustments to the roads included therein as may be desired. For purposes of the preceding sentence, it is understood that the written approval of the County Manager or designee shall be sufficient to evidence the approval of the County of revisions to Exhibit A.
- C. If Contractor or its subcontractors use County Roads which are not indicated on the attached Exhibit A, (as same may be amended from time to time) Contractor shall be liable to repair any damage cause to such roads to the satisfaction of the County.
- D. Contractor agrees that, during construction and continuing until a period that is six (6) months after the commencement of commercial operation of the Project, within a seventy two (72) hour period, or longer, as agreed with the County Manager or designee in the case that immediate repair is not possible, after any damage occurs that impairs safe travel, Contractor shall repair or shall cause to be repaired each County Road located in the Project and accessed in connection with the construction of the Project so as to return such roads to a condition that is at least substantially the same condition that such roads were in as of the date of this Agreement. As used herein, it is agreed that "County Roads" include all County Roads Identified on Exhibit A, roadways, rights-of way, ditches and alleys.
- E. County agrees to make available all County Road easement information and specifications for the necessary haul or use routes to Contractor. County agrees to grant all available access rights to Contractor within existing easements, such that are necessary in connection with the contemplated repairs, alterations and improvements and that it will inspect and approve the repairs and improvements in a timely manner.

Section 4. Notification and Obligation Regarding Damages

- A. Exhibit A attached hereto identifies any and all County Roads, roadways, rights-of-way, ditches or alleys that Contractor intends to and is authorized to use, drive on, work in, improve (temporarily or permanently) or otherwise utilize for access and/or egress for purpose of the Project. The Parties acknowledge that Exhibit A may be modified or amended from time to time as detailed in Section 3(B) above.
- B. The Parties acknowledge that it may be necessary for Contractor to improve or alter (such as adding areas to roads to accommodate larger radius turns) certain of the County Roads prior to use thereof in connection with the Project.

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- C. Contractor shall notify the County Manager and/or designee with a schedule and at least three (3) weeks' advance notice of any anticipated work, cuts, changes, alterations, modifications, closures or partial closures of any County Roads as a part of the Project. Contractor shall comply with County Road Cut Ordinance 2002-01. As used in Section 4, the term "Closure" shall mean any of Contractor's construction activities which prohibit the public use of an affected County Road, or any portion thereof, for customary vehicular travel that is reasonably expected to result in traffic not being able to traverse such portion of the road for a period in excess of one and one-half (1 ½) hours during the hours of 6 a.m. to 9 p.m. Mountain Standard Time.
- D. Contractor shall be solely responsible for ensuring that any vehicles, trucks, trailers, or other objects, specifically and without limitation, any oversized loads, that travel any County Roads shall have proper escort vehicles, flags and warnings as required by law, including federal and state laws, rules and regulations. County shall not be responsible for and Contractor shall be solely responsible for any and all safety, health and security matters with regard to the transportation of any Project-related items on County Roads. Contractor shall be responsible for notification of the County and any property owners whose access to their property can reasonably be anticipated to be adversely impacted by a Closure,, at least one (1) calendar week prior to any Project-related item, load, vehicle, structure or other object that will be transported or carried on a County Road which will require a Closure of any County Road or County Road intersection.
- E. Contractor agrees to notify County Manager or designee at the time Contractor becomes aware of any damages and/or alterations on any County Roads and/or property. Possible alterations that may result in repairs and improvements will include, without limitation, cutting existing corners to allow for larger radius turns, construction of turnarounds and widening of roads.
- F. Contractor acknowledges that it is solely responsible for any and all alterations, repairs and improvements, including, without limitation, cutting existing corners to allow for larger radius turns, construction of turnarounds and widening of roads performed by it under this Agreement or otherwise incurred as a result of the activities of Contractor and its subcontractors with respect to the Project. Contractor agrees and acknowledges that it shall indemnify, defend and hold harmless County from and against any and all claims, suits, actions, judgments, demands, losses, costs, expenses, damages, and liability (but only to the extent, if at all, that the same are not covered or paid pursuant to the insurance required to be carried by Contractor hereunder) caused by, resulting from or arising out of the willful or negligent acts, errors, or omissions of Contractors, its officers, employees, agents, representatives, suppliers or contractors with regard to the Project and Contractor's proposed activities, including but not limited to any and all work, repairs, damages, improvements or alterations to any County Roads, County rights of way or County property. Contractor understands a number of County roads are based upon prescriptive uses over time. Any alterations, repairs and/or improvements outside of existing

prescriptive easements shall be the responsibility of Contractor to obtain authorization from affected land owners.

Section 5. No Duplication of Liabilities

The Parties agree and acknowledge that there shall be no duplication of liabilities or cross default under this Agreement and any separate agreements between the County and any other subcontractor, if any.

Section 6. Insurance

Contractor acknowledges that, prior to commencing any use of the County Roads in connection with the Project, it shall obtain and provide County with written verification of the existence of commercial general liability insurance in an amount of not less than One Million Fifty Thousand Dollars (\$1,050,000) per occurrence and Two Million dollars (\$2,000,000) in the aggregate. The required limits may be met with a combination of primary and/or umbrella excess limits. Insurance shall be maintained in effect at all times during this Agreement and provide coverage for property damage, personal injury, or death. Contractor covenants that, prior to commencement of construction, Contractor will have in place all such insurance and that it will continue to maintain said insurance throughout the term of this Agreement. Contractor shall provide written proof of insurance to County prior to any work beginning and shall notify County of any and all material changes, modifications, corrections or cancellations of insurance.

Section 7. Term / Termination / Notice

This Agreement shall become effective immediately upon the execution hereof by both Parties hereto. The Parties may also amend, terminate or extend this Agreement at any time, upon mutual written agreement of the Parties.

Either Party shall have the right to terminate this Agreement after having provide thirty (30) days' notice to the other party. Termination pursuant to this provision will not relieve Contractor from satisfactorily completing all work in progress at time of such termination, nor shall it relieve either Party from paying the other any sums due it under this Agreement.

Any Notices required to be given to either Party by this Agreement shall be in writing and shall be delivered in person, by courier service or via United States Postal Service certified or standard first class mail to Contractor and County using the addresses listed above, or electronically mailed to the following email addresses:

COUNTY

CONTRACTOR

Section 8. General Provisions

- A. New Mexico Law. This Agreement and all documents executed are deemed to be contracts under the laws of the State of New Mexico, and for all purposes shall be construed in accordance with such laws.

- B. Venue and Jurisdiction. The parties irrevocably agree that venue and jurisdiction are proper in the State of New Mexico and any legal action, suit or proceedings against them, jointly or severally, with respect to enforcement of any matter under or arising out of or in connection with this Agreement, shall be brought within the State of New Mexico.
- C. Severability. Should any one or more of the provisions contained in this Agreement be for any reason held to be invalid, unlawful, or unenforceable in any respect, such invalidity, unlawfulness or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, unlawful or unenforceable provision had never been contained herein.
- D. Entire Agreement. This Agreement and Exhibits attached set forth the entire Agreement between the parties. All negotiations relative to the matters contemplated by this Agreement are merged and there are no other understandings or agreements relating to the matters set forth, other than those incorporated in this Agreement. No provision of this Agreement shall be altered, amended, revoked or waived, except by an instrument in writing signed by the parties sought to be charged with such amendment, revocation or waiver.
- E. Modification. This Agreement may be modified only by a writing duly executed by the parties.
- F. Binding Effect. Each party acknowledges that they have read and understand this Agreement, that it is contractual and binding, and each party has had the benefit of independent legal counsel and executes the same as their own free will and accord for the purposes and considerations set forth herein.
- G. Authority. Each party by signing this Agreement hereby agrees that they are authorized to sign the same on behalf of the above named entities thereby binding each other individually as well as their respective entities.
- H. Construction. This Agreement shall not be construed against any party for having drafted it or for having the Agreement drafted by such parties' counsel.
- I. Assignments. This Agreement may not be assigned or delegated by Contractor to a nominee, without the expressed written consent of County. Any purported assignment and/or delegation shall not relieve Contractor from liability hereunder.
- J. Further Documents. The parties shall, in good faith, execute such additional documents as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.
- K. Remedies Upon Breach. Upon breach of this Agreement by a party, the other party hereto shall be entitled to seek and recover all damages and other remedies available to such party at law, in equity or under the terms of this Agreement, including all costs of litigation and reasonable attorneys' fees.

- L. Execution. This Agreement may be executed in one or more counterparts, each of which is deemed to be an original, and all of which will together constitute one and the same instrument.

IN WITNESS WHEREOF, the County and Contractor have executed this Agreement on the date written below.

COUNTY OF LINCOLN

CONTRACTOR

By:
Its: County Manager

By:
Its:

Date

Date

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