2009 HOUSE NATURAL RESOURCES

HB 1509

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 1-29-09

Recorder Job Number: 8132

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – Opened the hearing on HB 1509.

Rep. Jon Nelson – See **Attachment # 1.**

Rep. Drovdal – The PSC feels they aren't the correct agency for this. Do you have another agency in mind?

Rep. Nelson – I haven't seen that testimony. I would think they would be the proper agency for this. All the sitting is in the PSC area.

Rep. Keiser – We're putting in the code the authority to establish rules without any policy behind it. The rules then become the policy. Why aren't we establishing the policy in terms of code of content? Why this approach instead of doing our job?

Rep. Nelson – Stratage is an interesting game to play sometimes. If standards are perceived to be too ridged they don't go anywhere. What we attempt is to give landowners some sense of transparencies. A sense of when a developer comes to their door and sits down at the table with them. They won't feel strong armed to sign an agreement before that developer leaves. There needs to be some minimum standards of transparency of time where a family can take that contract and discuss that contract with their neighbors or an attorney, for their own liability. To see what liability they're accepting with signing these agreements. This wind energy has

been left along. They have had free rein. It has worked relatively well. The wind energy is growing, there are some very large farms being build and this is going to be an issue, I will guarantee you that. It is up to the state to establish some type of standards of behavior for the people who are negotiating these leases.

Rep. Keiser – I can point to the insurance codes, securities codes, and to many other codes where we have put into statute the transparency requirements for transactions. They are very clear. They were policy positions taken by the legislature. This legislation gives them the authority to do what they want. They are going to meet the requirements of the statute. No matter what they do why aren't we coming up with a clear set of minimum standards that have to be met?

Rep.Nelson – I would agree.

Rep. Phil Mueller – As you know, wind has been here a long time. Usage of wind isn't new. The farm I grew up on had a wind charger, a turbine, a 32 volt system. Today it is a different ballgame. As these leases have to be signed, there are a lot of questions, people have a concern. There are lots of different kinds of wind farms. There a lot of variations on concerns you have to have regarding which project you go into – the benefits, and significant benefits and significant liabilities. Whichever way you go. Most folks like to know how that is going to work. Is it $ 5,000 a tower and that is the end of the discussion? That's the point of 1509. Some way to let people out know what is going on. See **Attachment # 2** – a landowner's guide. Does the document you sign have a confidentiality clause? Can you talk to your neighbors about what you are doing and what they are doing? Determine payments, understand your options. We are going to have to lay out guidelines in the code. It is for the landowner's protection and the developer's protection.

Rep. Keiser – You have your standards right here in attachment # 2. This document is so well developed it could easily be transcribed into this bill as the standard.

Rep. Pinkerton – Are there currently wind leases where the holder of the surface property gets a percentage of the electricity in ND?

Rep. Mueller – There are some like that, or they're some being put together. They are all over the place. Yes there are some out there that will do what you are suggesting but there is no standardization. We want to standardize it. We want a company and a group of people in the community to decide what they want to do. The point of 1509 is how they know what they want to do, until they hear the whole story from different developers.

Chairman Porter – Do we have the same standards of conduct for oil leases, coal leases, gravel leases – any other kind of land use leases out there right now in statute? Even the provision that mandates it.

Re. Mueller – To my knowledge – no – I'm not sure about that, but I don't think so. I think probably the reason is down through time most of those issues have been dealt with. The difference is this is happening now, it is happening all of a sudden. I think you need to hold these developers accountable for what kind of information they pass on to the leases of the property.

Rep. DeKrey – I became interested in this bill around Christmas time when our family had a Christmas get to gather. My aunt was in negotiations for a wind farm on her farm. They were running into all the problems talked about here. She was lucky because her daughter is an attorney. Most landowners don't have that and they are running blind trying to do the best they can and they don't even know what the best thing to do is. She is here today and I'd like to have her give her testimony because she has experienced all of this first hand.

Colleen Rice – See **Attachment # 3.**

Bill Kalanek – ND Alliance for Renewable Energy – See **Attachment # 4**. We support this bill & hope for a Do Pass.

Brad Crabtree – See **Attachment # 5**.

Woody Barth – ND Farmers Union – See **Attachment # 6**. This was prepared by Kayla Pulvermacher.

Harlan Fuglesten – ND Association of Rural Electric Cooperatives – We represent generation and transmission cooperatives. From the position of being able to see the utility and landowner side we are in a unique position to see some of the problems that arise. Although the stories we hear are usually 2nd and 3rd hand, I'm here today to say this is a real problem. There are real issues for landowners to decide and Ms. Rice's testimony says it much better than I could. On behalf of our organization of HV 1509.

Brian Kramer – ND Farm Bureau – We would like to add our support to this bill. I have heard in the last 6 months to a year looking for the kind of information that is included in the handout Rep. Mueller gave you. I think that is a very good step. I've also heard from producers, landowners that have signed these leases and now wish they hadn't because of some of the provisions in them. They feel they were sold a bill of goods.

Illona A. Jeffcoat-Sacco – See **Attachment # 7 & 8.** The commission feels it doesn't appropriately belong with the PSC. I used 3 examples in my testimony, coal mining, sitting, and basic transmission for a regulated utility and in none of those areas does the commission get involved in the landowner, developer negotiations. I was thinking for a day now for a nice one sentence explanation why it seems to be a conflict when you are balancing the interest of the developer and the interest of the rate payers. Environmentally or money wise, to then be involved in those individually and somehow balancing those individual negotiations. That is our concern. Questions?

Rep. DeKrey – Who then?

Illona – I've been thinking about that too and I don't have an answer. Some of those standards he was initially talking about insurance or utilities they apply to a licensing function. I used to do a little oil development you had associations that had a code of conduct and if you want to claim you are a certified land man you subscribe with that code of conduct.

Chairman Porter – Further testimony in support of HB 1509? Testimony in opposition?

Bryce E???? – Didn't sign in – I'm not really in opposition, just some questions I think you need to take into consideration. They are looking putting up 1300 turbines in Birth and Mountrail Co. These turbines are unique; they are designed by General Electric and used in the Netherlands right now. They are gas fired when the wind's not blowing so they go 24/7. What we would like to do is use the flair off natural gas that is currently being wasted. We hope to get that done. The Governor did mention it in his State to the State address. We're happy about that. Some concerns about the bill. We have 5 land agents working right now and we rented a building in Kenmare and we've had no complaints what so ever. Any business has got its staff people. We're not strong arming people, we're not the mafia. There is good and bad in every industry. I have always used an attorney. I am not going to do a land deal like this without an attorney. If I was signing a lease to put wind towers on my land, I'd have an attorney look it over, or if they were digging on my land for oil or gravel or anything else, I'd have an attorney look it over. I think this is a private thing between an individual and their attorney. I understand if there are some problems. It sure seems like it. This committee should try looking at addressing it and I'm not sure if this is exactly the proper way. I talked to one of the sponsors of the bill and he said if you don't sign today you don't sign. I've bought cars before and the salesman will tell you "This price is only good for today". They do that to you all the time. That is just a sales tactic. I hope you don't rush through it. It sounds there is some

problems, and I hope that can get worked out. I do think that is what attorneys are in business for.

Rep. Keiser – Don't you think we have to meet a reasonable standard in our policy relative to transparency? Especially in an area like this where you are dealing with legally unsusificated individuals who have tremendous assets potentially. The reality is a reasonable amount of transparency should be required.

Bryce – I'm not sure not how to deal with this. The state protects us from a lot of things.

Chairman Porter – Further testimony in opposition to HB 1509? We will close the hearing on HB1509.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 2-12-09

Recorder Job Number: 9329

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman Porter – HB 1509 amendments 0101 that Rep. DeKrey has handed out.

Rep. DeKrey – HB 1509 has a hog house amendment. If you remember the testimony this amendment pretty much addresses the whole enchilada of what was testified about on what the standards should be in a wind contract. The language in the beginning tells about 15 point type. That is very similar to what we have in our insurance code. That's not really new, it's just what is in the insurance code for ND. It goes on to mention the bullet points that we came to decipher from testimony. The one you might want to look at is # 4 on the 2nd page because what the proponents wanted was the wind company to provide up to $ 5,000 for an attorney for the landowners. We thought that was a stretch. What we did agree on was on number 4 that if the company on its own volition hires you an attorney, and they pay for it, you sign the lease then they are exempt from anything that is laid out in this law. It would not apply to them. PSC didn't want to regulate it and the consumer division out at the Attorney General's office didn't want to be involved because there wasn't any funding available to do it, so it is just a statement in 3 there that if you violate this law you would have a right to private action. That is basically the only teeth in it. I move its adoption.

Chairman Porter – Are you moving that subsection 4 along with it?

Rep. DeKrey – If they decided to, and I can't imagine they ever would, if they decided to pay for an attorney for the farmer that would be a kind of an insurance policy for them. If they did that and the farmer signs the lease they would be exempt from any other provisions in this law.

Chairman Porter – Rep. DeKrey has moved the amendment 0101 is there a 2nd?

Rep. Hofstad- 2nd

Chairman Porter – 2nd from Rep. Hofstad discussion? Without the other 2 members of the subcommittee being here, they were all in agreement with what was presented.

Rep. DeKrey – We actually disagreed on this until we had the # 4 explained to us and then we agreed after that. We thought they had to do that and they don't.

Chairman Porter – Further discussion on the amendment? Seeing none all those in favor – unison voice vote – opposed none. We have an amended bill in front of us.

Rep. DeKrey – Move Do Pass As Amended

Chairman Porter – We have a motion for a Do Pass As Amended on HB 1509. Is there a 2nd?

Rep. Hofstad – 2nd

Chairman Porter – 2nd from Rep. Hofstad – discussion?

Rep. Drovdal – I think it is very interesting and something we need to do. I think it's a good start.

Chairman Porter – Further discussion? Seeing none the clerk will call the roll on a Do Pass as Amended on HB 1509.

Yes 12 No 0 Absent 1 Carrier Rep. DeKrey

Prepared by the Legislative Council staff for
Representative DeKrey
February 11, 2009

VR
2/12/09
1082

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1509

Page 1, line 2, replace "a code of conduct" with "requirements" and after "for" insert "wind easement and"

Page 1, replace lines 6 through 20 with:

"**Requirements for wind easements and wind energy leases.**

1. In a wind easement and a wind energy lease, the easement and lease:

   a. Must be written in a clear and coherent manner using words with common and everyday meanings, be appropriately divided and captioned as to various subject matters, and be in at least fourteen-point type.

   b. Must be delivered to the property owner with a cover page containing the following paragraph with the correct term of years in the blank and in at least sixteen-point type:

      Special message to property owners

      This is an important agreement our lawyers have drafted that will bind you and your land for up to _____ years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the agreement and negotiate changes on your behalf.

   c. Must be executed at least five business days after the easement or lease has been delivered to the property owner.

   d. May not contain a confidentiality clause keeping the terms of agreement or related negotiations confidential.

   e. Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement.

   f. May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind generation.

   g. May not make the property owner liable for any damages caused by the wind facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.

   h. Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.

i. Must contain a clear description of the development activities that will take place within five years in order to avoid termination under section 17-04-03 or 17-04-05.

j. Must allow the property owner to terminate the agreement if the wind generating facility has not operated for a period of at least three years.

k. Must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.

l. Must contain in any indemnity obligation on the property owner an indemnity obligation placed on the developer, owner, or operator of the wind energy facility of at least equal terms.

2. The owner of the wind generating facility shall carry property insurance on the facility and include the property owner as an additional insured on the policy and waive subrogation actions against the property owner.

3. If the terms of the wind easement or wind energy lease are not in accordance with this section or the owner of the facility does not carry property insurance as required under subsection 2 as determined by a court as a matter of law, the court may reform the easement or lease in accordance with this section, void the easement or lease, or offer the relief as is requested by the property owner. The court shall award reasonable attorney's fees to the property owner in a successful action by the property owner under this section.

4. If the lessee provides up to five thousand dollars reimbursement for actual attorney's fees and the wind easement or wind energy lease has the written approval of an attorney representing the property owner, the easement or lease is deemed not to violate this section."

Renumber accordingly

Date: 2-12-2009
Roll Call Vote #: _____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1509

House Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☑ Do Pass ☐ Do Not Pass ☑ As Amended

Motion Made By DeKrey Seconded By Hofstad

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep Hanson	✓	
Vice Chairman Damschen	✓		Rep Hunskor	✓	
Rep Clark	✓		Rep Kelsh		
Rep DeKrey	✓		Rep Myxter	✓	
Rep Drovdal	✓		Rep Pinkerton	✓	
Rep Hofstad	✓				
Rep Keiser	✓				
Rep Nottestad	✓				

Total (Yes) 12 No 0

Absent 1

Floor Assignment DeKrey

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1509: Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1509 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "a code of conduct" with "requirements" and after "for" insert "wind easement and"

Page 1, replace lines 6 through 20 with:

"**Requirements for wind easements and wind energy leases.**

1. In a wind easement and a wind energy lease, the easement and lease:

   a. Must be written in a clear and coherent manner using words with common and everyday meanings, be appropriately divided and captioned as to various subject matters, and be in at least fourteen-point type.

   b. Must be delivered to the property owner with a cover page containing the following paragraph with the correct term of years in the blank and in at least sixteen-point type:

      Special message to property owners

      This is an important agreement our lawyers have drafted that will bind you and your land for up to _____ years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the agreement and negotiate changes on your behalf.

   c. Must be executed at least five business days after the easement or lease has been delivered to the property owner.

   d. May not contain a confidentiality clause keeping the terms of agreement or related negotiations confidential.

   e. Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement.

   f. May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind generation.

   g. May not make the property owner liable for any damages caused by the wind facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.

h. Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.

i. Must contain a clear description of the development activities that will take place within five years in order to avoid termination under section 17-04-03 or 17-04-05.

j. Must allow the property owner to terminate the agreement if the wind generating facility has not operated for a period of at least three years.

k. Must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.

l. Must contain in any indemnity obligation on the property owner an indemnity obligation placed on the developer, owner, or operator of the wind energy facility of at least equal terms.

2. The owner of the wind generating facility shall carry property insurance on the facility and include the property owner as an additional insured on the policy and waive subrogation actions against the property owner.

3. If the terms of the wind easement or wind energy lease are not in accordance with this section or the owner of the facility does not carry property insurance as required under subsection 2 as determined by a court as a matter of law, the court may reform the easement or lease in accordance with this section, void the easement or lease, or offer the relief as is requested by the property owner. The court shall award reasonable attorney's fees to the property owner in a successful action by the property owner under this section.

4. If the lessee provides up to five thousand dollars reimbursement for actual attorney's fees and the wind easement or wind energy lease has the written approval of an attorney representing the property owner, the easement or lease is deemed not to violate this section."

Renumber accordingly

2009 SENATE NATURAL RESOURCES

HB 1509

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: March 13, 2009

Recorder Job Number: 10917

Committee Clerk Signature	

Minutes:

Senator Lyson opens the hearing on HB 1509, relating to requirements for wind easement and wind energy leases.

Representative Nelson introduces the bill (see attached testimony #1).

Senator Triplett Can you explain what happened on the House side?

Representative Nelson the bill in its original form was permissive. The House looked at the issue as being so urgent they decided it needs to be acted upon more rigorous than the bill allowed. The components of the bill have made every effort to work with the industry to make sure this will work not only for the landowners but also the industry.

Senator Erbele does the bill pattern after any of the other industries policies?

Representative Nelson I am not aware of anything that was borrowed from that section of code. There are a number of states that have enacted protections for landowners with wind leases. Some of that language was included or considered in the development of this piece of legislature.

Representative Mueller the large scale production of wind energy is new to this state. The important thing is to do the leases right and responsibly and in consideration for the landowner. I have a handout (see attachment #2) from Michigan that goes through the whole lease

process. It has some questions you should ask as you move into and through a leasing operation for a wind development. It is certainly an important emerging North Dakota resource and we need to encourage it.

Colleen Rice spoke in favor of the bill (see attachment #3).

Senator Hogue asks for a copy of the lease that was presented to Colleen's parents.

Colleen Rice I will bring it in for you, but I feel I need to delete the prices.

Senator Hogue the forth provision indicates to me if the lessee provides $5,000 for payment of attorney's fees that the entire act would not be in violation of this section.

Colleen Rice if this bill is passed there is a list of items that must be in a contract. If they went to a lawyer, the first thing the lawyer would do is go to the statutes and look at the list. I feel the lawyers up here have to get better informed on the landowner issues so they can adequately represent the landowners.

Representative DeKrey I am in full support of this bill. I put the bill forth for some relatives of mine after I was made aware of some of the problems they have been having. I tried to model some of it off of the North Dakota Insurance law.

John Olson, Ottertail Power Company and Nexterra Energy, We are in favor of the bill if it is amended. I have an amendment for your consideration (see attachment #4). This was crafted in conjunction with Excel Energy and Basin Electric. I know the matter of contract is unique to each industry and to every lawyer. I will walk you through the amendment and explain why we proposed them.

Senator Hogue the first amendment gives the landowner 5 days to think over the contract and to go their lawyer and ask questions. I was wondering what the objection of your clients is to that one?

John Olson the delivery itself is confusing. I think there are initial drafts that are provided to the land owner. I don't think there is a lot of heartburn on the concept if it could be worded more carefully and eliminate that confusion.

Curtis Jabs, Basin Electric Power Cooperative, we are in favor of the bill and support the amendments. When the wind farm facilities are being constructed and put in place then they must make accommodations. There is going to be roads, towers, transmission lines and accommodations have to be made for that. We thought if the company is making the lease payments the landowner shouldn't have the right to terminate the lease and that is the reason for section 5. The way section 6 was written the owner of the wind generation facility shall carry property insurance. We didn't think property insurance was the right term so we came up with general liability.

Kath Aas, Excel Energy, we are also in support of the bill as amended by the proposed amendments by Mr. Olson. The leases that we negotiate are always confidential. It was also unclear on the start date of those 5 days.

Terry Dammel, Landowner, I will read from one of my contracts to reiterate one of the points. As a landowner I will be responsible for anything that the wind tower is on and I assume that responsibility. They are asking me in this contract to be responsible for anyone else. I think it has to be clear in the language of who is actually responsible for what.

Bill Kalanek, North Dakota Alliance for Renewable energy, spoke in favor of the bill (see attachment #5).

Brian Kramer, North Dakota Farm Bureau, spoke in favor of the bill. There are landowners across the state that has had problems or issues with their lease contracts. I feel this bill will help take care of some of the issues.

Senator Triplett is there anything that the ND Farm Bureau has done for its members in response to the concerns you have been hearing?

Brian Kramer yes we have. We held a meeting recently in the northwestern part of the state that was hugely attended.

Richard Schlosser, North Dakota Farmers Union, spoke in favor of the bill. We have received calls prior to landowners signing an agreement. The landowners know once they sign the agreement they can't discuss the contract. We have told our members to read the contract carefully. We have asked our leaders in our organizations to become involved in the local projects to help guide these landowners through the process. We are in favor of winder development, but we think there is a need to help level the playing field.

Harlan Fuglesten, North Dakota Association of Rural Electric Cooperatives, We also stand in support of the bill. We are familiar with some of the confusion and problems landowners are having. We understand the need for a base level of protection and support from the state. We think this bill is an important step in the development of wind energy in the state and we support it. We have published articles in our magazines. We always tell our members to seek legal council before signing the contract.

Senator Pomeroy What is your opinion on the amendments?

Harlan Fuglesten We support the amendments that are of specific concern with Basin Electric.

Bill Brudvick, Attorney, I signed the bill in opposition but I didn't know about the amendments Mr. Olson proposed and I will go on record in support of the amendments. They are good amendments for a bill that had good intentions but was seriously flawed. I think it seeks to legislate contracts between private parties and to single out one industry as opposed to system

wide. The confidentiality clause is necessary and protects both sides in the contracts. We support the bill with the amendments proposed today.

Senator Lyson closed the hearing on HB 1509.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB1509

Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: 4/2/09

Recorder Job Number: 11680

Committee Clerk Signature

Minutes: **Senator Lyson, Chairman**

Committee work

Senator Hogue delivers his amendments, .0202.

Senator Lyson gives the reason why he wanted an emergency clause put on this.

Senator Triplett says she was an original sponsor of the bill and explains it has changed greatly. She said she doesn't like this bill at all. She would prefer a do not pass but will work with the amendments brought forward.

Senator Hogue talks about the amendments brought in by John Olson for the energy companies. He said they accepted 4 ½ of Olson's amendments and reject 2 ½ of them.

He then goes on to explain the proposed amendments.

Senator Schneider asks about the confidentiality clause, he said often times there is a lot of trade information or possibly trade secrets, have they considered that.

Senator Hogue said Mr. Brudvig, an attorney, sent some information concerning that; he did not accept that as being accurate. He said he would be open to some provision that says the parties can't share a trade secret information or price. He adds that some landowners who are potentially going to have a wind turbine on their property are not the same as your mineral owners who have more bargaining power.

Senator Triplett says she has no problem with any of the amendments, thinks they all improve the bill but not enough to make her want to vote for the bill.

Senator Lyson looks at .0201amendment first.

Senator Hogue moves those amendments

Senator Freborg seconds

Verbal vote, all yes

Senator Lyson asks for a motion on .0202 amendment

Senator Hogue moves the amendment

Senator Schneider seconds

Senator Lyson says this makes it an emergency clause and inserts lease.

Verbal vote – all yes

Senator Triplett asks for discussion, she relates the testimony of a woman whose family was taken advantage of. She thinks this has become feel good legislation that doesn't really solve the problem. She said there needs to be a lot more information and sharing done. She gives credit to the NDSU Extension for having an article on their web site about wind turbines. She says we need to inform people what their rights are and what power they have.

Senator Triplett moves a do not pass

Senator Erbele seconds

Senator Hogue speaks in opposition to the motion, thinks it's worthwhile to establish a baseline set of standards to a new industry. He states the Uniform Commercial Code is filled with provisions to protect consumers from form contracts similar to the one that was discussed at the hearing. He said this is a modest good proposal.

Senator Schneider says this bill will not eliminate the need for landowners to go out and get competent legal advice.

Roll on a do not pass

Vote – 2 yes, 5 no – motion fails

Senator Hogue moves a do pass as amended

Senator Schneider seconds

Vote – 5-2 – motion carried

Senator Hogue will carry

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1509

Senate Transportation Committee

☐ Check here for Conference Committee

Hearing Date: April 2, 2009

Recorder Job Number: 11701

Committee Clerk Signature

Minutes:

Committee Work

Senator Lyson said that the wind people will be in to fight this bill if they don't keep the confidentiality in there.

Senator Triplette said that was fine.

Senator Lyson said he didn't want to lose the bill.

Senator Pomeroy asked if there was some kind of limited confidentiality.

Senator Lyson said that he thought they had some trade secrets that they want kept confidential.

Senator Schneider said Bill K. and John Olson were going to come up with some type of language to provide for a limited confidentiality statement but that hasn't been done.

Senator Lyson said they will hold this over and asked Senator Schneider to contact them to see if they have anything.

Prepared by the Legislative Council staff for
Senator Hogue
March 13, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after "leases" insert "; and to provide a contingent effective date"

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c." with "b." and replace "five" with "ten"

Page 2, line 1, replace "d." with "c."

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 7, replace "g." with "f."

Page 2, line 11, replace "h." with "g."

Page 2, line 14, replace "i." with "h."

Page 2, line 17, replace "j." with "i."

Page 2, line 18, after "years" insert ", unless the property owner receives the normal lease payments that would have occurred if the turbine had been operating during that time. For the purposes of this subdivision, the term "normal lease payments" means payments at least equal to the periodic payments received by the property owner in the last calendar year that the turbine was in full operation"

Page 2, line 19, replace "k." with "j."

Page 2, line 22, replace "l." with "k."

Page 2, line 25, replace "property" with "general liability" and replace "on the" with "relating to events occurring on the wind energy facility project site. At minimum, the insurance must"

Page 2, line 26, remove "facility and" and remove the second "and"

Page 2, line 27, remove "waive subrogation actions against the property owner"

Page 3, replace lines 4 through 7 with:

"**SECTION 2. CONTINGENT EFFECTIVE DATE.** Subdivision h of subsection 1 of section 1 of this Act becomes effective if Senate Bill No. 2245 as enacted by the sixty-first Legislative Assembly does not become effective."

Renumber accordingly

Date: 4/2/09

Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate Natural Resources Committee

☐ Check here for Conference Committee Bill #: 1509

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Amendment .0301

Motion Made By _____ Seconded By _____

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman			Senator Jim Pomeroy		
Senator David Hogue, Vice Chairman			Senator Mac Schneider		
Senator Robert S. Erbele			Senator Constance Triplett		
Senator Layton W. Freborg					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

carried
voice vote

Prepared by the Legislative Council staff for
Senator Hogue
March 25, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after "leases" insert "; and to declare an emergency"

Page 3, after line 7, insert:

"**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

Date: 4/2/09

Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate Natural Resources Committee

☐ Check here for Conference Committee

Bill #: 1509

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Amendment .0202

Motion Made By Sen. Hogue Seconded By Sen. Freborg

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman			Senator Jim Pomeroy		
Senator David Hogue, Vice Chairman			Senator Mac Schneider		
Senator Robert S. Erbele			Senator Constance Triplett		
Senator Layton W. Freborg					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

carried voice vote

Date: 4/2/09

Roll Call Vote #: 3

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate Natural Resources Committee

☐ Check here for Conference Committee

Bill #: 1509

Legislative Council Amendment Number

Action Taken ☐ Do Pass ☑ Do Not Pass ☑ Amended ☐ Amendment

Motion Made By Sen. Triplett Seconded By Sen. Erbele

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman		✓	Senator Jim Pomeroy		✓
Senator David Hogue, Vice Chairman		✓	Senator Mac Schneider		✓
Senator Robert S. Erbele	✓		Senator Constance Triplett	✓	
Senator Layton W. Freborg		✓			

Total (Yes) 2 No 5

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

failed

Date: 4/2/09

Roll Call Vote #: 4

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate Natural Resources Committee

☐ Check here for Conference Committee

Bill #: 1509

Legislative Council Amendment Number

Action Taken ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Amendment

Motion Made By Sen. Hogue Seconded By Sen. Freborg

Senators	Yes	No	Senators	Yes	No
Senator Stanley W. Lyson, Chairman	✓		Senator Jim Pomeroy	✓	
Senator David Hogue, Vice Chairman	✓		Senator Mac Schneider	✓	
Senator Robert S. Erbele		✓	Senator Constance Triplett		✓
Senator Layton W. Freborg	✓				

Total (Yes) 5 No 2

Absent

Floor Assignment Sen. Hogue

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1509, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1509 was placed on the Sixth order on the calendar.

Page 1, line 2, after "leases" insert "; to provide a contingent effective date; and to declare an emergency"

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c." with "b." and replace "five" with "ten"

Page 2, line 1, replace "d." with "c."

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 7, replace "g." with "f."

Page 2, line 11, replace "h." with "g."

Page 2, line 14, replace "i." with "h."

Page 2, line 17, replace "j." with "i."

Page 2, line 18, after "years" insert ", unless the property owner receives the normal lease payments that would have occurred if the turbine had been operating during that time. For the purposes of this subdivision, the term "normal lease payments" means payments at least equal to the periodic payments received by the property owner in the last calendar year that the turbine was in full operation"

Page 2, line 19, replace "k." with "j."

Page 2, line 22, replace "l." with "k."

Page 2, line 25, replace "property" with "general liability" and replace "on the" with "relating to events occurring on the wind energy facility project site. At minimum, the insurance must"

Page 2, line 26, remove "facility and" and remove the second "and"

Page 2, line 27, remove "waive subrogation actions against the property owner"

Page 3, replace lines 4 through 7 with:

"**SECTION 2. CONTINGENT EFFECTIVE DATE.** Subdivision h of subsection 1 of section 1 of this Act becomes effective if Senate Bill No. 2245 as enacted by the sixty-first legislative assembly does not become effective.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

2009 HOUSE NATURAL RESOURCES

CONFERENCE COMMITTEE

HB 1509

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

House Natural Resources Committee

☒ Check here for Conference Committee

Hearing Date: 4-21-09

Recorder Job Number: 12041

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman DeKrey: We'll call the conference committee on HB 1509 to order.

Senator Hogue: Looking at the evolution of the bill on the House side, I see it started out as a code of conduct. When it came over to the Senate it had some mandatory features for wind leases and agreements. The Senate Natural Resources when through the required components of a wind lease or easement and we heard testimony about their proposed amendments. We looked at their proposed amendments and decided some of them were a good idea, and some were not a good idea. The guiding principle was, we recognized the landowners and the wind developers have 2 different bargaining positions. There is a disparity of bargaining power between the two of them. I think the underlying principle was trying to make the playing field as level as possible to give the landowner some level of leverage, so the landowners can effectively negotiate these perspective agreements with the wind developers. From that we went through the suggested changes by the industry and again we accepted some and rejected some. If you have 90881.0203 those are our amendments. The first one we removed the quotation "Must be written in a clear and coherent manner using words with common" we delegated that because how that provided any guidance to the people who would be drafting these documents. They are well written documents, they're lengthy 35 and

40 page documents. They are coherent and they are clear. That didn't seem to provide any additional guidance. The next substantive one you see "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility." That seemed like a good amendment, it's just making it clear and requiring the landowner to acknowledge that at least their surface operations are going to change as a result of entering into these agreements. That is something that is often implied in mineral leases and it seemed like a good idea to make it clear in writing in wind development. The amendments we rejected, and industry wanted to take out the provision that prohibits making these agreements confidential among the parties. We felt that was a fundamental component this bill was aimed at. Giving the landowners the ability to discuss these agreements among themselves and have some way of knowing what the market price is for what they are selling. There is no posted market for this and if the willing sellers can't discuss this among themselves it's hard for them to know what the value is that they are selling. The next substantive amendment "unless the property owner receives the normal lease payments that would have occurred if the turbine had been operating during that time." This is a clause that allows there to be some dormancy in the use of the turbines similar to what you have in the oil and gas lease where you are getting lease payments throughout the primary term. We thought this was a reasonable compromise. The landowners continuing to receive revenue under the agreement that should be a way to continue the agreement's in place. The industry also requested the landowner be required to carry general property casualty insurance from entering into one of these agreements. We rejected that proposed amendment. One might think it's a good idea to have insurance to insure against those types of risk, but we didn't think it was fair the industry could compel the landowner to

buy insurance, so we didn't put that one in. We did require the operator to have insurance. The last one on page 1 of the amendments "waive the subrogation actions against the property owner", that seemed like a reasonable request as well. Then on page 2 there's another bill I think has – SB 2245 – that provision can come out. Finally, we heard testimony that there lots of ongoing negotiations. We thought if the purpose of the bill is to provide some level playing field, we thought the sooner the field is level the better, that's why we put on the emergency clause.

Chairman DeKrey: Since the Senate has passed the bill, we've had quite a few formal and informal discussions about this legislation. The 2 areas that keep coming up the industry has problems with, and even the landowners to some extent, on the confidentiality clause is they believe they are trying to protect trade secrets and the way they write their contracts they think gives them an advantage in the market place. These are all types of things they feel would be excluded under the no confidentiality clause. They would like to see us modify the confidentiality clause in some manner in which we could still seek landowner protection and achieve that level playing field, but not harm the industry in such a way that we would make ND an island in the nation in wind development. The other issue that comes up quite a bit is the emergency clause. The industry is saying they are in the middle of negotiations right now with companies. If we were to impose the emergency on them and this bill were to be passed and signed by the Governor some of them would have to start all over again.

Senator Hogue: This is a new and merging industry in ND and across the country. I can understand from the wind developers perspective why you would want to keep things quiet. You don't want the sellers to have good facts about what their product is worth. That's a good stratigy. You require confidentiality, so nobody knows what it's worth. The problem that's unique to this industry is that the landowner doesn't have the same negotiating power the

mineral owner has. The mineral developer is going to go where the petroleum is. What we've seen with the wind developer is they tend to pick the soft targets. If you want to negotiate with them they tend to go around you and go to the next track of land that will not be as willing to negotiate. Within certain paramators they can locate their wind towers where they can find a low hanging fruit. That seems to me to be a fundamental disadvantabe, where the landowners of the wind development has that the mineral owners don't. Second, just because it is a new and emerging industry, if they have that confidentially for the next 5 years, they are signing these 20 and 25 year leases, it won't be necessary to have that once they get everybody signed up. That is 2 of the key reasons for the confidentiality clause. On the emergency clause, I wouldn't concur with their notion they would have to start over. You put an emergency clause in place and it goes into effect when the Governor signs it. If your agreement is signed on that day, the law that governs is the law that was in effect on the day the agreement was signed. I think that was a little overstated. All kinds of industries have to deal with the laws changing on them, in our case a biannual basis, and in the case of Congress on an annual basis. To suggest that would be difficult is to deny the reality that laws change all the time.

Senator Schneider: My concern is that we want to provide protection to landowners, but we don't want to protect them right out of the ability to obtain a wind energy lease to begin with. I do have some concerns of the confidentially clause is a bit over broad. I think this committee could work to protect the landowners effectively, but also address some industry concerns.

Chairman DeKrey: During the testimony in the House it became quite evedient the wind industry in ND is very new and is emerging. Statements were made that there is not a qualified wind attorney in the state that a landowner could actually hire. If there are one they are working for the wind companies. The consumer protection for the landowner is warrented

by the legislature. I think to offer them some protection, I see it as our duty to do that. Even during the discussion of the bill we saw some of the heavy handed tatics that some of the wind companies can exert during the discussion of this. I think that points out us all the more how important it is that we do come to some agreement here. I know there are some amendments floating around we both need to look at, but I wanted today at our first meeting to kind of get both positions out on the table in the House and Senate to kind of find out where we're at so we have so we've got some kind of starting point.

Senator Erbele: Just for the record, I was in the minority position on the committee as far as supporting the amendments. I do feel very strongly about needing something in the confidentiality clause. We had the first of the largest wind farms came into my district, and a very reputable company. They were equal to all the landowners. They even paid for the attorney fees to have their contract examined. We also have some wind developers that have now emerged in my district that are developer wanabees, I call them, that are very suspect in the type of contracts they are offering people and the pressure they are putting on people. We do need to arrive at some balance here and as the bill currently stands I can't support it. I'd rather see the whole bill defeated than to go forward as it is. I think we can through the course of a couple here meetings here we can come to something that is going to address the concerns. We really need to protect the legitamite companies that are doing good work in this state that have made a significant investment in this state and have promised to do further. As far as the emergency clause, whenever the bill goes into effect, whether it is now upon signage, or whether it's August first. There is going to be ongoing contract negotiations that may be disrupted.

Rep. Damschen: I have some concerns over actually prohibiting confidiality which would do in this bill the way it is. If there is a mutual agreement confidential agreement we shouldn't

disallow that. I agree to, we need some regulation, but the regulations are usually not for the good reputable companies, it's usually for the ones we fear might show up later and not be so above board. In doing that, we'll need to be really careful that we don't remove the incentive for the good ones to do business and to continue to develop our industry in the state. None of us are qualified in this developing industry to micromanage it.

Rep. S. Kelsh: I agree with much of what's been said with Senator Hogue stating that this is a working industry and we do need to give landowners the knowledge to be able to negotiate from a position of knowing what they are getting into and what is available to them from developers. They need to be able to have discussions with their insurance agents and other various 3rd parties that have an impact. If you have a wind turbine on your land and your neighbor decides to sue you because they can no longer have aerial spraying because they have that wind turbine in their way, whose liable for that? Is it the developer or the landowner? I think the landowner needs to know up front what their liabilities are. We need to have some kind of compromise where the landowner is negotiating from the position of knowledge while at the same time protecting some of the trade secrets the reputable developers need to protect in order for them to be competitive. As far as the emergency clause, I've had a number of coorespondence regarding that. Some of those negotiations are in process and it would disrupt them. If it was August 1st it would give them time to prepare for the change coming and give them time to negotiate.

Chairman Dekrey: I was given some amendments by an industry representative and I'll pass those out and you can look at them at your leasure until the next meeting and see if you can agree with all or part of them. That will give us some place to start. I have heard there are other amendments floating out there too that are going to be made available to the committee. We will adjourn. I won't reschedule the committee immediately like they do often times in

these conference committees. They'll give us a day or two to talk amongst ourselves and see what's floating out there and maybe try to meet toward the end of the week again.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

House Natural Resources Committee

☒ Check here for Conference Committee

Hearing Date: 4-27-09

Recorder Job Number: 12286

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman DeKrey: Open the hearing on HB 1509. See **Attachment # 1.** DeKrey Amendment .0204 On Friday we seemed pretty close to an agreement, but now on Monday morning I'm not so sure that's the case. If members of the committee would you like to voice their opinions on the amendment, I'd be all ears.

Senator Hogue: From the senate side I'm not sure we got these amendments, so could we have a couple minutes to look them over.

Chairman DeKrey: Sure

Senator Hogue: When we talk about an agreement are the wind developers all on one hand and the landowners on the other hand?

Chairman DeKrey: On Friday we thought all the wind developers, other than RES, were in agreement to the amendment that was floated on Friday. It was my understanding the landowners, even though they didn't particularly care for it a lot, thought they could live with it, but now this morning I've been informed neither side, landowners nor developers, are happy with this set of amendments. I guess if we do have an agreement; it is an agreement to disagree.

Senator Erbele: As far as trying to collate the amendment into the bill. Has anyone shared with you the particular where the disagreement lies? Can we go through and find what we agree with here and work from there?

Chairman DeKrey: It seems to always come back to the confidentiality agreement. This amendment pretty much says there's no confidentiality until the final terms of the agreement, and then the financial conditions upon agreement of both parties would be confidential. I've heard from landowner interests this morning that the financial part of it is the least of their worries on the terms. We heard there was a disagreement over the 10 day provision, after the last hearing we were told that was not a problem. Actually, one of the companies would give you a signing bonus if you signed up within 15 days. We thought we had an agreement on the insurance part of it, where they thought the wind company should have to be named as an additional insured on the landowner's policy. That's all gone away now. Each carries their own insurance. There was some heartburn over the language that said the landowner was responsible for any 3rd party that he gave permission to be on the land for any damage they caused. The immediate concern that came up was what if a hunter accidentally shoots the tower – who was liable? That never was clarified. The emergency clause was removed.

Senator Schneider: Page 2 line 1 confidentiality agreement in the final executed lease or easement. I've heard some of these confidentiality agreements goes on in perpetuity. Not only does that outlast the live of the landowner, but also his children, grandchildren and on into perpetuity. That may be something the committee would want to consider looking into.

Chairman Dekrey: I've heard one of the provisions in some of these easements is they would not allow hunting. I can imagine how popular that is with the general population in ND.

Rep. Damschen: I've heard that some of these 25 year leases automatically renewed at the end of 25 years. I've got some concerns from landowners in my area that the 99 year lease is a stumbling block for them regarding whether they want to sign or not.

Rep. Kelsh: Other states have been in wind energy for a long time before ND got into it. I think we should look at those other states as a model is this issue.

Senator Schneider: There are 2 ways to discourage wind development in ND. 1 is to scare off the developers and the other one is to lose the landowners support.

Senator Erbele: I'm not familiar with the 99 year lease talk. Where does that come up?

Rep. Damachen: I've been contacted by land owners and they are concerned with the term of the lease for 99 year. He hadn't signed it yet. I personally haven't heard of a 25 year lease that automatically renews.

Senator Erbele: You made the comment that the financial part of it wasn't really a part of it on the part of the landowners.

Chairman DeKrey: That was the lead sponsor of the bill talked to me this morning and he made the comment that the landowners as a group felt there were bigger fish to fry than the financial part of it.

Senator Erbele: You don't know what it is?

Chairman DeKrey: I don't know what it is, no. One thing I do know, we don't have votes in committee to pass the amendment before us, and we don't have the votes for the house to succeed to the senate. We're kind of at a deadlock right now.

Senator Hogue: I don't think the confidentiality amendment is where it needs to be to balance the two. One thing I mentioned to my senate colleges this morning is I'm OK with limiting the disclosure to a certain classes of people, like the professionals, the accountants, the attorneys and the insurance agents, that's fine, but what troubles me about this one and the original

proposal is that the confidentiality would be in effect the day you signed it. To me means that the if you want to encourage free discussion between landowners, so once you sign it you can't talk anymore. A reasonable compromise would be to say you can discuss it for a period after you execute these documents, say 30 /60 days and thereafter it would be confidential. On the amendment that would compel the landowner to get insurance, I would be flatly opposed to that. I think that is a business decision all landowners should make for themselves.

Rep. Kelsh: .0204 – are we taking out any reference to indemnity on the part of the developer and requiring the landowner to carry the insurance necessary?

Chairman DeKrey: The way I read the amendment is the landowner is responsible, minimum, to carry general liability on the property around the facility.

Rep. Kelsh: I seem to remember an amendment with reference to indemnity in it.

Chairman DeKrey: I think that was the original bill.

Senator Hogue: I think the requirement that the landowner be required to buy insurance was an amendment the industry offered that the senate rejected.

Chairman DeKrey: We will recess for now and reschedule later.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1509

House Natural Resources Committee

☒ Check here for Conference Committee

Hearing Date: 4-28-09 Vote

Recorder Job Number: 12326

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

Chairman DeKrey: Call the conference committee to order on HB 1509. We've all had a chance to talk in the halls on this bill. Does anybody have any desires?

Senator Hogue: I've looked at about 6 different amendments on this bill, and I thought before we started going through the amendments it might be worthwhile to see where the committee is on asking the House accede to the Senate amendments. I move the House Accede to the Senate amendments.

Senator Schneider – 2nd.

Chairman DeKrey: It has been moved and 2nd that the House Accede to the Senate amendments. Any discussion on the motion?

Senator Schneider: I'd like the committee to try to address the confidentiality agreements, see if we could reach a compromise on that.

Rep. Damschen: I would really like to spend more time doing that. I agree we need to address the confidentiality issue.

Chairman DeKrey: Seeing no further discussion the clerk will call the roll on the motion.

Vote: 3 Yes 3 No 0 Absent Motion Fails

Senator Erbele: We've all looked at some amendments 0211, and it does talk about the confidentiality issues that brought this bill to the front. It does leave the discussions open in the early phases of the negotiation, and then when we get to the final agreement the confidentiality kicks in. I move the 0211 amendments.

Senator Schneider: 2nd.

Chairman Schneider: We have a motion by Senator Erbele and 2nd by Senator Schneider to move the 0211 amendments. Further discussion?

Chairman Hogue: Before we talk about the confidentiality, I'd like to go back to the insurance provision on page 2. Am I correct in understanding the requirement the landowner to buy insurance has been taken out of this amendment?

Chairman DeKrey: My understanding of these amendments is the wind company and the landowner would be responsible for their own insurance and the law would not require a landowner to carry general liability insurance. It is my understanding under this amendment any meaning of included insured's would be in negotiations between the landowner and the wind company.

Senator Hogue: On the confidentiality provision, it is my understanding in this amendment it's not materially different than what we've been talking about for significant amount of time. I think from the landowner's perspective the troublesome feature of the confidentiality clause is it went into effect, and all of a sudden the landowner was not able to talk to family members or neighbors about the wisdom of signing the agreement, or about negating specific terms, including price. What this amendment does is says they can't talk about it after they sign the agreement. If they want to talk to the landowners and advise their neighbors about what kind of deal they've negotiated, they can't do it. To me that's contrary to why we want to prohibit this confidentiality. My thought is we want to prohibit this so there is an open market, where

everybody has access to information. Specifically price information. This would close that market off after a landowner signs the agreement. I don't think this accomplishes what the landowners need. I would much rather we extend that confidentiality out for 30 days after they sign the agreement so they are still free to talk to whomever they wish to talk to.

Senator Erbele: In my experience with wind farm developing in communities. I've seen a wide open discussion of that. They generally have community meetings and the terms of the agreements are discussed openly with everyone. There is a certain amount of time you have before you even sigh where the information is open and accessible to everyone. In that time before you sign is when you'd want to seek your attorney's advice and opinion, the banker's and everyone else. Once you've gone far enough down the road to where you're actually going to sign, you'd have gathered enough information at that point.

Senator Schneider: I share a lot of Senator Hogue's concern, I think they're very well founded. The message has got to be "Landowners don't sign" talk to your neighbors, talk to your lawyer, talk to your landowners association, and this bill under these amendments would guarantee them that right. There will be an open market amongst landowners in terms of their ability to communicate with each other and negotiate a price with these developers. It is a positive step forward and decreases the desperate nature of the bargaining power and the relationship between the developer and the landowners.

Rep. Kelsh: I agree with Senator Hogue's concerns. I think 30 days or 15 days is the right number, but I think it should be some provision that allows the landowner who has already signed a contract to be able to talk to someone who hasn't.

Senator Hogue: It seems we've had a tale of 2 different scenarios under which these contracts are offered to the landowners and then ultimately signed. Senator Erbele and landowners from other parts of the state have had a very good experience. There's been

community meetings, there is complete transparency in what's going on, and people understand the agreements. For those developers and landowners we don't even think we need this legislation. The other side of the tail is we have 1 or more developers that engage the land men, or other agents to go out and sign up large volumes of land under terms that are unfair to landowners and lock them into these long term 99 year leases. That's what we have to legislate for. We don't have to legislate for the responsible developers. It's the companies that are less than fair to the landowners. That's why we need to take a stance that will level that playing field. By saying it's confidential after execution closes off that opportunity to talk to your neighbors.

Rep. Damschen: I'm not going to belabor this point. It is much more critical on these long term leases that you get it right. Confidentiality over a short period of time isn't the issue it is over 99 years. That's a discussion for another day. It is a long time to sign a lease for and you want to do it right.

Senator Hogue: For the mover of the amendments, would they regard that as a friendly amendment to permit the landowner to discuss it up to 30 days after execution of the final agreement.

Chairman DeKrey: I had discussions with some of the wind energy people and they are adamantly opposed to that. They feel once the contract has been signed that should be the end of negotiations and that should be the contract and that's when the confidentially should take place. They are quite opposed to that.

Rep. Damschen: The opportunity before the signing to discuss it to protect the signer, if you are contemplating signing a contract and you tell me the terms you are negotiating and I say "I'd hold out for more". I don't think I'd be violating the confidentiality of my agreement. Before I signed my agreement and some developer came to me and said I want you to sign a

confidentiality agreement prior to signing the lease that would be a BIG red flag. I wouldn't sign anything like that.

Rep. Kelsh: Does the 0211 amendment apply to all aspects of the signed agreement or just the financial part of that?

Chairman DeKrey: My reading of the amendment is it would be whatever the landowner and the wind company put into that mutually agreed upon confidentiality agreement at the end. If you remember we heard testimony that the wind companies operate differently. Some of them, the way they do their leasing, they feel gives them the edge in the open market between wind companies, and they want to keep that confidential.

Rep. Kelsh: I would argue that's not really an open market if it is confidential.

Senator Hogue: Is it your understanding that all the interested wind developers support this amendment, or a fraction of them support this amendment?

Chairman DeKrey: My understanding is that, although some of them are not happy with this amendment, they would all support this amendment. There won't be anybody working against the bill if this is the amendment that goes on, from the wind energy group. It might go too far for the landowners and they might work against the conference committee report. I don't have any guarantees of that. My understanding is this amendment, the wind companies won't work against the conference committee report.

Vote: 5 Yes 1 No 0 Absent Motion Carries

We now have the bill 1509 before us as amended. Is there any further motions?

Senator Erbele: From the work on the bill we've done, and the issue that has come before us I think it would be important we keep the discussion ongoing to make sure we got it right. As you indicated there is some nose holding on this, but there is general agreement. I feel a study would be in order. We do want to have an environment here where wind development

will continue to take place. We want to encourage that and at the same time we don't want landowners trapped with something they'll regret or that 30 – 40 years from now that we are in an onerous situation for the landowners. I have the amendment – 0210 – that would talk about specifically what we've been talking about here. The easements, leases, confidentiality clause, the liabilities, and the indemnities and insurance. It would behoove us, as this is still a new and emerging industry that we do a careful study of it, so I would like to add the study amendment to what we just passed.

Senator Schneider: 2nd.

Chairman Dekrey: Any further discussion? We will try a voice vote – `

I have no further amendments so seeing no further discussion from the committee we are going to adjourn and we will see what happens to the conference committee on the floor of the house.

Senator Hogue: To Rep. Kelsh's question, as I read that page 1 line 1 it says replace the remainder of the bill.

Chairman DeKrey: His motion to be to add it as a study, just taking the study portion. That's all the amendment was.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No1509

House Natural Resources Committee

☒ Check here for Conference Committee

Hearing Date: 4-29-09

Recorder Job Number: Correction to Report of Conference Committee

Committee Clerk Signature Nancy L. Gerhardt

Minutes:

There was a sentence left out of the amendments: 90881.0212 Title: .0400. Legislative Council made a correction and sent it directly to the front desk.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1509 (, as (re)engrossed): Date: 4-21-2009

Your Conference Committee _____

For the Senate:		YES / NO		For the House:		YES / NO	
Roll				Roll			
P	Senator D. Hogue			P	Chairman DeKrey		
P	Senator R. Erbele			P	Rep. Damschen		
P	Senator M. Schneider			P	Rep. S. Kelsh		

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ – _____

____, and place _____ on the Seventh order.

____, adopt (further) amendments as follows, and place _____ on the Seventh order:

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: _____
CARRIER: _____

LC NO. of amendment
LC NO. of engrossment
Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: _____

SECONDED BY: _____

VOTE COUNT ___ **YES** ___ **NO** ___ **ABSENT**

Revised 4/1/05

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1509 **(, as (re)engrossed):** **Date:** 4-27-2009

Your Conference Committee _____

For the Senate:				**For the House:**			
Roll		YES / NO		Roll		YES / NO	
P	Senator D. Hoque			P	Chairman DeKrey		
P	Senator R. Erbele			P	Rep Damschen		
P	Senator M. Schneider			P	Rep. S. Kelsh		

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ **--** _____

____, **and place** _____ **on the Seventh order.**

____, **adopt (further) amendments as follows, and place** _____ **on the Seventh order:**

____, **having been unable to agree, recommends that the committee be discharged and a new committee be appointed.**

((Re)Engrossed) _____ **was placed on the Seventh order of business on the calendar.**

DATE: _____
CARRIER: _____

LC NO. of amendment
LC NO. of engrossment
Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: _____

SECONDED BY: _____

VOTE COUNT ___ **YES** ___ **NO** ___ **ABSENT**

Revised 4/1/05

Attachment #1

90881.0204
Title.

Prepared by the Legislative Council staff for
Representative DeKrey
April 24, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

That the Senate recede from its amendments as printed on pages 1219 and 1220 of the House Journal and pages 1014 and 1015 of the Senate Journal and that Engrossed House Bill No. 1509 be amended as follows:

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c. Must" with "b. May not", after "executed" insert "by the parties until", replace "five" with "ten", and after "the" insert "first proposed"

Page 2, line 1, replace "d." with "c.", replace "contain a" with "require either party to maintain the", replace "clause keeping" with "of any negotiations or", and replace "agreement or" with "any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement"

Page 2, line 2, remove "related negotiations confidential"

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 7, replace "g." with "f."

Page 2, line 11, replace "h." with "g."

Page 2, line 14, replace "i." with "h."

Page 2, line 17, replace "j." with "i."

Page 2, line 18, after "years" insert "unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if this language is not provided for in the lease or easement, payments at least equal to the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation"

Page 2, line 19, replace "k." with "j."

Page 2, line 22, replace "l." with "k."

Page 2, line 25, replace "property" with "general liability" and replace "on the" with "relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may"

Page 2, line 26, remove "facility and" and remove the second "and"

Page 2, line 27, replace "waive subrogation actions against the property owner" with ". The property owner shall carry general liability insurance relating to property damage and bodily injury occurring on the owner's property"

Page 2, line 29, remove "or the owner of the facility does not carry property insurance as"

Page 2, line 30, remove "required under subsection 2 as determined by a court as a matter of law"

Page 3, line 1, replace "offer the relief as is requested by the property owner" with "order any relief allowed by law" and remove "The"

Page 3, remove lines 2 through 7

Renumber accordingly

H 1

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1509 **(, as (re)engrossed):** **Date:** 4-28-2009

Your Conference Committee House Natural Resources

For the Senate:				For the House:			
Roll		YES	NO	Roll		YES	NO
P	Senator D. Hogue	✓		P	Chairman DeKrey	✓	
P	Senator R. Erbele		✓	P	Rep. Damschen		✓
P	Senator M. Schneider		✓	P	Rep. S. Kelsh	✓	

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from) Failed

the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

____, and place _____ on the Seventh order.

____, adopt (further) amendments as follows, and place _____ on the Seventh order:

____, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: 4-28-2009
CARRIER: _____

LC NO. of amendment
LC NO. of engrossment
Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Senator Hogue

SECONDED BY: Senator Schneider

VOTE COUNT 3 **YES** 3 **NO** 0 **ABSENT**

Revised 4/1/05

Motion Fails

Library

Adopted by the Conference Committee
April 28, 2009

VR
4/28/09
1082

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

That the Senate recede from its amendments as printed on pages 1219 and 1220 of the House Journal and pages 1014 and 1015 of the Senate Journal and that Engrossed House Bill No. 1509 be amended as follows:

Page 1, line 2, after "leases" insert "; and to provide for a legislative council study of wind easement and wind energy leases"

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c. Must" with "b. May not", after "executed" insert "by the parties until", replace "five" with "ten", and after "the" insert "first proposed"

Page 2, line 1, replace "d." with "c.", replace "contain a" with "require either party to maintain the", replace "clause keeping" with "of any negotiations or", and replace "agreement or" with "any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement"

Page 2, line 2, remove "related negotiations confidential"

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 6, after the second "wind" insert "energy"

Page 2, line 7, replace "g." with "f." and after "wind" insert "energy"

Page 2, line 11, replace "h." with "g."

Page 2, remove lines 14 through 16

Page 2, line 17, replace "j." with "h."

Page 2, line 18, replace "generating" with "energy" and after "years" insert "unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation"

Page 2, line 19, replace "k." with "i."

Page 2, remove lines 22 through 24

Page 2, line 25, replace "generating" with "energy", replace "property" with "general liability", and replace "on the" with "relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may"

Page 2, line 26, remove"facility and" and replace the second "and" with an underscored period

Page 2, remove line 27

Page 2, line 29, remove "or the owner of the facility does not carry property insurance as"

Page 2, line 30, remove "required under subsection 2 as determined by a court as a matter of law"

Page 3, line 1, replace "offer the relief as is requested by the property owner" with "order any relief allowed by law" and replace "The" with:

"**SECTION 2. LEGISLATIVE COUNCIL STUDY - WIND EASEMENTS AND WIND ENERGY LEASES.** During the 2009-2010 interim, the legislative council shall consider studying wind easements and wind energy leases. The study must include consideration of confidentiality clauses, the liability of each party for damages and taxes, instrument provisions relating to insurance and the need for insurance, and the concerns of property owners and wind developers. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Page 3, remove lines 2 through 7

Renumber accordingly

#2

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1509 (, as (re)engrossed): Date: 4-28-2009

Your Conference Committee House Natural Resources

For the Senate:				For the House:			
Roll		YES / NO		Roll		YES / NO	
	Senator D. Hogue	✓			Chairman DeKrey	✓	
	Senator R. Erbele	✓			Rep. Damschen	✓	
	Senator M. Schneider	✓			Rep. S. Kelsh		✓

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) 1219 - 1220

___, and place _____ on the Seventh order.

✓, adopt (~~further~~) amendments as follows, and place 1509 on the Seventh order:

___, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: 4-28-2009
CARRIER: Rep. DeKrey

LC NO. 90881.0212 of amendment .0400
LC NO. of engrossment
Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Senator Erbele

SECONDED BY: Senator Schneider

VOTE COUNT 5 **YES** 1 **NO** 0 **ABSENT**

Revised 4/1/05

3

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)

Bill Number 1509 **(, as (re)engrossed):** **Date:** 4-28-2009

Your Conference Committee _____

For the Senate:				For the House:			
Roll		YES / NO		Roll		YES / NO	
	Senator D. Hogue	✓			Chairman DeKrey	✓	
	Senator R. Erbele	✓			Rep. Damschen	✓	
	Senator M. Schneider	✓			Rep. S. Kelsh	✓	

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ – _____

___, and place _____ **on the Seventh order.**

✓, adopt (further) amendments as follows, and place _____ **on the Seventh order:**

___, having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ **was placed on the Seventh order of business on the calendar.**

DATE: 4-28-09
CARRIER: _____

LC NO. **of amendment**
LC NO. **of engrossment**
Emergency clause added or deleted
Statement of purpose of amendment

MOTION MADE BY: Senator Erbele

SECONDED BY: Senator Schneider

VOTE COUNT 6 **YES** 0 **NO** 0 **ABSENT**

Voice Vote Unanimous

Revised 4/1/05

REPORT OF CONFERENCE COMMITTEE

HB 1509, as engrossed: Your conference committee (Sens. Hogue, Erbele, Schneider and Reps. DeKrey, Damschen, S. Kelsh) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1219-1220, adopt amendments as follows, and place HB 1509 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1219 and 1220 of the House Journal and pages 1014 and 1015 of the Senate Journal and that Engrossed House Bill No. 1509 be amended as follows:

Page 1, line 2, after "leases" insert "; and to provide for a legislative council study of wind easement and wind energy leases"

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c. Must" with "b. May not", after "executed" insert "by the parties until", replace "five" with "ten", and after "the" insert "first proposed"

Page 2, line 1, replace "d." with "c.", replace "contain a" with "require either party to maintain the", replace "clause keeping" with "of any negotiations or", and replace "agreement or" with "any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement"

Page 2, line 2, remove "related negotiations confidential"

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 6, after the second "wind" insert "energy"

Page 2, line 7, replace "g." with "f." and after "wind" insert "energy"

Page 2, line 11, replace "h." with "g."

Page 2, remove lines 14 through 16

Page 2, line 17, replace "j." with "h."

Page 2, line 18, replace "generating" with "energy" and after "years" insert "unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation"

Page 2, line 19, replace "k." with "i."

Page 2, remove lines 22 through 24

Page 2, line 25, replace "generating" with "energy", replace "property" with "general liability", and replace "on the" with "relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may"

Page 2, line 26, remove"facility and" and replace the second "and" with an underscored period

Page 2, remove line 27

Page 2, line 29, remove "or the owner of the facility does not carry property insurance as"

Page 2, line 30, remove "required under subsection 2 as determined by a court as a matter of law"

Page 3, line 1, replace "offer the relief as is requested by the property owner" with "order any relief allowed by law" and replace "The" with:

"**SECTION 2. LEGISLATIVE COUNCIL STUDY - WIND EASEMENTS AND WIND ENERGY LEASES.** During the 2009-2010 interim, the legislative council shall consider studying wind easements and wind energy leases. The study must include consideration of confidentiality clauses, the liability of each party for damages and taxes, instrument provisions relating to insurance and the need for insurance, and the concerns of property owners and wind developers. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Page 3, remove lines 2 through 7

Renumber accordingly

Engrossed HB 1509 was placed on the Seventh order of business on the calendar.

2009 TESTIMONY

HB 1509

Testamony #2

TESTIMONY

HOUSE BILL 1509

REP. JON NELSON

Good Morning Chairman Porter and members of the House Natural Resource Committee. My name is Jon Nelson and I serve District 7 in the ND House of Representatives and appear before you this morning to introduce HB 1509.

HB 1509 would require the PSC to establish rules developing a code of conduct for lessees in the negotiation of wind lease agreements with landowners.

As you know, I am a strong advocate for wind energy development in this state and I fully support its responsible growth. Landowners, as well as the general public, expect that of the lignite industry as well as the oil and gas industry, and we have passed strong landowner protections in that regard. As the wind industry continues to build in the state, I believe the citizens of North Dakota expect no less from this industry.

HB 1509 is intended to be voluntary. If the rules that the PSC develop are perceived to be too onerous for the

developer, the developer can simply choose not to sign the pledge. In that case, the developer would only have to disclose that fact to the landowner. This should provide some comfort and credibility for landowners when negotiating with companies that do sign the pledge.

It is now my intention to turn over the podium to landowners from across the state to explain the need for this legislation.

I appreciate the opportunity to appear for you today and hope you after careful deliberation will give HB 1509 a DO PASS recommendation. Thank you.

Same given to Senate

Attachment #2

Revised February 2008

LANDOWNER GUIDELINES FOR EVALUATING WIND ENERGY PRODUCTION LEASES

Stephen B. Harsh
David Schweikhardt
Lynn Hamilton

Department of Agricultural, Food and Resource Economics
Michigan State University
© 2008

The process of evaluating a wind lease can be complex, and the signing of such a lease involves a long-term commitment by the landowner. Leases can be as short as a few pages or as long as a hundred pages. As a general rule, longer lease documents provide more detailed responsibilities for the leasing parties and are more likely to provide specific answers for disputes that arise in the future. It is also important to note that nearly all leases are option agreements and do not guarantee that wind energy will be developed on the property. A modest fee ($5 to 10 per acre) is paid for the option of developing the property for wind energy generation. Whether this option is exercised will depend upon a number of factors (e.g., adequacy of the wind resource, electricity prices, proximity to the electrical grid, local regulations, etc.)

This worksheet is designed to help landowners consider some important issues that should be addressed in a lease and some of the alternatives to address those issues. This worksheet is divided into sections related to key issues in wind energy contracts. Where appropriate there are comments to help you understand some alternatives to consider for each issue. It is strongly advised that you obtain legal assistance to better understand the provisions presented in the lease. ***This worksheet is not a substitute for obtaining legal counsel regarding the lease – it is intended to help focus your discussions with qualified legal counsel.***

I. Basic Details of the Lease

Name of leasing agent_____

Description of land parcel(s) and portions of parcels to be leased _____

Contract person/company _____

II. Introductory Issues

A. What are your long-term (25 to 35 years) plans for the land parcel(s) covered by the lease?

- ☐ Retain in farming
- ☐ Recreational use (e.g., hunting)
- ☐ Sell to others
- ☐ Commercial development
- ☐ Keep as "natural" as possible
- ☐ Other _____

Wind energy leases are long-term agreements, with the shortest length being 20 to 25 years and the longest as much as 99 years. If you or your heirs have plans to use these parcels for another purpose during the life of the lease, you may be prevented from doing so by the lease or because the parcel is less desirable for the purpose you envision in the future.

B. To what degree will the lease payments help or hinder your plans or goals?

- ☐ Very important for plans or goals
- ☐ Somewhat important for plans or goals
- ☐ Somewhat hinders plans or goals
- ☐ Significantly hinders plans or goals

❑ Limited importance for plans or goals ❑ Neither helps nor hinders plans or goals

The lease payment might help achieve your plans or goals and will likely affect your financial options in the future. If the lease payments help achieve your financial objectives, then the lease might be useful in meeting your future goals. On the other hand, if the lease prevents your use of the property for other purposes, then the lease may hinder your longer term goals or plans.

C. Who is offering the lease?

❑ A leasing agent ❑ A community wind project
❑ An in-state wind developer ❑ An out-of-state wind energy firm
❑ An international wind energy firm ❑ Other_____

There are many firms offering wind energy leases. Some firms assemble a block of land that could be developed into a wind farm and then sell the leases to a wind developer for a fee. Another firm may offer leases and intends to develop the wind project itself. Other issues to consider are: Does the firm have prior experience in developing wind projects and, if not, is there a good chance they will succeed with the project? Would you prefer to have a lease with a community-based project, a local firm, or a firm located in a foreign country? Regardless of who originally offers the lease, there may be an assignment clause in the lease. Be sure to see section IV below for details about assignment clauses. In addition, if you are dealing with a firm from outside Michigan, be sure to see section IX below for details about the legal ramifications of dealing with an out-of-state firm.

D. Does the lease have a confidentiality clause?

❑ Yes ❑ No

Many legal analysts advise against signing a lease containing a confidentiality clause. This clause may prevent discussion of the lease with other landowners involved in the project and may inhibit family communications.

III. Length of the Lease

A lease will usually have two or three time periods: 1) an evaluation phase, 2) a production phase, and 3) an option for extension of the production phase. The sum of these phases can be quite long. Be aware of the length of each phase and the total time commitment for your property under the lease.

A. Evaluation or discovery phase

1. What is the time permitted for the evaluation phase? _____ Years
2. If the developer is permitted to extend the evaluation phase, how long is the extension? _____Years

In the evaluation phase, the developer will collect information about wind speeds and conduct an economic analysis to determine the viability of the project. In some cases, the contract will permit the evaluation phase to be extended by the developer. It is desirable to keep this phase as short as possible. With a long evaluation phase, a developer can control the property for several years while waiting for the project's viability to improve (e.g., easier access to the electricity grid, finding financial resources, higher electricity prices). During this time, you would not be permitted to sign a contract with another developer with more immediate plans to develop the property. Note: The length of the evaluation phase is of such critical importance that some states (e.g., South Dakota) have limited the phase to 5 or 7 years by law.

B. Production phase.

1. What is the length of the production phase? _____ Years

The length of the production phase in the lease is usually 20 to 30 years. A long production phase is necessary because the investment has a long payback period. Usually, a shorter phase is desired because this provides an earlier opportunity for the landowner renegotiate the terms of the lease or use the land for other purposes.

C. Renewal or extension of the production phase

1. What is the length of time the production phase may be extended by the developer?_____ Years

Some developers claim that an extension clause is necessary to obtain financing for the project. Most wind

projects, however, have financing terms of 12 to 15 years, well within the range of the initial production phase. Consider the following issues if faced with this decision: What land use decisions might you, your heirs, or a buyer want to make? Will the lease payments be sufficient 30 years from now? It is generally in the landowner's best interest to be able to renegotiate the terms of the lease before it is renewed, or to be able to terminate the agreement at the end of the lease. By avoiding an automatic extension clause, you might be able to protect your future land use options. If the developer seeks an extension clause, then additional financial compensation should be negotiated.

D. Total lease period

To determine the maximum time the parcel will be committed to the lease, add the following:
Evaluation Phase (1) _____ + Evaluation Phase Extension (2) _____ + Production Phase (3) _____ + Production Phase Extension (4) = _____ Total Years Committed

IV. Compensation Clauses

Because there are many payment options, the determination of the compensation clause is a difficult issue in any lease for wind energy development. Careful attention must be paid to the payment method's impact on the landowner's returns for the entire length of the lease.

A. What is the payment being offered during the evaluation phase of the lease? _____ $/Acre
This payment is offered for the option of developing the parcel for production of electricity from wind. Be aware that a firm offering a higher payment does not imply that the firm is more committed to actually developing the property for wind energy. Thus, do not become too concerned with this payment – instead, focus on the payments during the production phase for the lease. Production payments are much more critical in determining the landowner's long-run returns from the project.

B. What method is used to determine payments for the electricity generated during the production phase?

- ☐ A lump-sum payment at the beginning of the lease ($_____)
- ☐ An annual fixed payment per turbine ($_____)
- ☐ A payment based on a percentage of the electricity sales (____%)
- ☐ A payment based on an annual fixed payment and a percentage of the electricity sales ($ _____ annually and _____%)
- ☐ Other_____

If the lease offers a lump-sum payment at the beginning of the lease, then this payment will be the only payment you will receive during the life of the lease. There might be situations in which having access to an immediate payment is desirable, but care must be taken with this option. What are the tax consequences of a lump-sum payment? How does it compare to a lease with payments over time? To compare the options, use a standard financial annuity formula to convert the lump-sum payment into annual payments. It is important to make this calculation so you are fully informed about your decision.

The option of a fixed payment per turbine guarantees the landowner's payment regardless of how much electricity is generated. Thus, the developer will bear the risk related to variations in the electricity generated. At the same time, you will receive this payment only if the project is actually developed. With this option, it is important to know the size of the turbine installed because the payment offered should be higher for larger turbines.

Another option is for the lease to share a percentage of the electricity sales with the landowner. Thus, returns can vary based on variations in wind speed and the landowner will share in the risk associated with the quantity of electricity produced. To obtain an estimate of the payment received under this lease, obtain the following

information about the Power Purchase Agreement (PPA) that the developer has negotiated with the electricity buyer (the electricity generated is usually measured at the connection to the grid or at the turbine site):

- *The electricity sale rate (Dollars per kilowatt-hour);*
- *An estimate of the annual kilowatt-hours of electricity generated per turbine at the point where the power is measured (this will be affected by the quality of the wind resource and the size and type of turbine installed);*
- *Your percentage share of the electricity sales specified by the lease.*

By multiplying these three estimates, you can calculate your estimated annual returns per turbine. With this payment option, there could be many unknowns because the PPA, the wind resource strength, and the type of turbine to be installed might not be known at the time of the signing of the lease.

C. How many turbines will be installed on your property? _____

For leases offering a fixed payment per turbine or a percentage of electricity sales, it is necessary to estimate the number of turbines to be installed on your property. This payment will vary by the size of turbine installed. With larger turbines, the payment per turbine should probably be larger. The number of turbines multiplied by the expected annual payment per turbine will equal the total annual payment.

D. Will "pooling" be used to calculate the value of electricity sales?

❑ Yes ❑ No

This procedure may be used if the lease payment is based on a percentage of the electricity sales. If pooling is used, then your returns will be based on your share of the acreage in the project. If you own 10% of the total acreage in the project, then your share would be 10% of the electricity sales from all the turbines in the project, even if you had more or less than 10% of the turbines on your property.

E. Does the compensation clause include the sale of the Renewable Energy Credits (RECs)?

❑ Yes ❑ No

Electricity from renewable energy projects (including wind) have two sources of value: 1) the value of the electricity generated (Dollars per kilowatt hour) and 2) the value of the Renewable Energy Credits (RECs). When negotiating the PPA, the developer might sell both the electricity and the RECs, or the developer might sell only the electricity, with the RECs being sold to another buyer. In either case, does the lease share the value of the RECs with the landowner? How will the value of the RECs be determined? The value of the RECs is expected to increase in the future as the states or the federal government enact Renewable Portfolio Standards or new regulations on climate change issues.

F. Does compensation clause have an inflation adjustment provision?

❑ Yes ❑ No

Because of inflation, a dollar ten years from now will have less value than a dollar today. It is desirable, therefore, to have a compensation agreement that increases your payment to adjust for inflation at specific intervals (e.g., annually or every five years). The developer is likely to have an inflation adjustment included in the PPA with the utility. Therefore, the landowner should request an inflation clause to protect the value of future payments. Otherwise, the inflation-adjusted value of your payment will diminish significantly over the 20 to 30 year life of the lease.

G. Does the compensation clause include payment for the land removed from existing uses by the developer (such as permanent roadways or structures) during the production phase?

❑ Yes ❑ No

During the production phase, the developer must have ongoing access to the turbines and may need to construct other structures on the land. The lease should specify the landowner's payment per acre for the temporary use of this land.

H. Does the compensation clause include payment for the land used by the developer during the construction phase,

such as temporary roadways, temporary structures, space for large equipment such as cranes, etc.?

❑ Yes ❑ No

During the construction phase, the developer might need access to land on a temporary basis. If such use interferes existing with uses of the land (e.g., prevents the planting of a crop or destroys an existing crop). The lease should specify the landowner's payment per acre for the use of this land during this phase. In addition, the lease should specify that land used on a temporary basis will be returned to its original state by the developer before the construction is concluded.

I. Does the lease contain a Force Majure clause?

❑ Yes ❑ No

A Force Majure clause permits the developer to extend the time of the lease if a delay is caused by any law, legal action, or requirement of a government agency, court, or utility. The clause may also apply to natural causes that prevent the development or use of the project. During the time this clause is in effect, any payment due to you could be delayed or avoided by the developer. These clauses are common in oil and gas leases.

IV. Assignment Clauses

A. Does the lease have an assignment clause?

❑ Yes ❑ No

An assignment clause permits the wind developer to sell/transfer the lease rights to another party. Thus, a lease with this clause may mean that a different company will own the rights to the lease in the future. If the lease has an assignment clause, you may want to consider at least two options. First, you may want to negotiate a higher payment rate as compensation for the risk you face in dealing with another party in the future. Second, you may want to negotiate a provision in which the developer is liable if the lease is assigned to a third party and the third party fails to satisfy the terms of the lease (especially the payment terms). In a similar matter, does the lease permit the developer to mortgage the leased property to a third party without the landowner's permission? If the developer mortgages the property under lease to a third party, and the developer then defaults to the third party, the landowner's rights relative to the developer and the third party would be affected. A lease should specify the conditions under which a mortgage may be exercised by the developer and the landowner's right of approval in such a case. In additional, the lease should limit the landowner's obligations to the third party.

VI. Property Taxes

A. Does the lease specify who will pay the property taxes associated with turbine(s), other equipment, or any other improvements on the property?

❑ Developer ❑ Landowner

The turbine(s) and any other associated improvements are very likely to be considered improvements in the property and therefore subject to property tax. In some cases, contracts specify that the developer is liable for the property taxes associated with the wind project. If the landowner is to be liable for such tax increases, the compensation received by the landowner should reflect such an expense.

VII. Liability Issues

A. Who will be responsible for liability coverage?

❑ Developer ❑ Landowner

At least four potential liability issues should be considered in the negotiation of a lease. First, the liability of the landowner for damage he/she commits on the turbine and other facilities on the property is a major issue that should be specified in the lease. Be aware that the landowner also might be liable for damages caused by a third party whom the landowner grants permission to use the property. For example, assume the landowner gives permission for a third party to hunt on the land. If the hunter damages a turbine, is the landowner liable for those damages? Second, is the developer liable for damages to the landowner's property at each phase

(evaluation, construction, production) of the lease? Third, is the developer liable for damages that occur to a third party? For example, assume a third party is injured by ice that falls from the blades of a wind turbine. Is the developer or the landowner liable for the third party's injuries? Fourth, does the lease require the developer to carry insurance on the turbine and associated facilities? In addition to consultation with an attorney, the landowner should have the contract reviewed by his/her insurance agent.

B. Who will pay the cost of any litigation with a third party?

❑ Developer ❑ Landowner

Litigation with a third party can arise in many situations. For example, assume a neighbor, claiming to be affected by the noise of the turbine, sues to halt the operation of the turbine. Will the cost of responding to that lawsuit be borne by the developer or the landowner? The lease should specify which party will pay the cost of such events.

VIII. Other Restrictions on Land Use

A. Are there restrictions (e.g., a prohibition of hunting) which prevent the landowner from using the property for other desirable purposes?

❑ Yes ❑ No

The lease may contain provisions that limit the landowner's use of the land. At the very least, the lease is likely to limit the height or location of building construction near the turbine(s), the height of trees or other obstructions near the turbine(s), and other activities that could interfere with the operation of the turbine(s). While some provisions are necessary to permit the efficient operation of the turbine(s), landowners should be sure that such clauses are narrowly written to prevent interference with other activities on the property.

B. Who will pay the cost (e.g., fines, etc.) for violations of land use regulations caused by the project?

❑ Developer ❑ Landowner

Wind projects can be subject to many local land use and zoning regulations (e.g., setback regulations). If the project violates a regulation, and a fine or other penalty must be paid, which party will be liable for such a violation? The lease should specify (a) each party's responsibility in complying with such regulations during the life of the lease and (b) each party's responsibility in the case of violations of such regulations.

C. Is the turbine or an associated structure located on land enrolled in the Conservation Reserve Program?

❑ Yes ❑ No

Wind turbines may be placed on land enrolled in the CRP, but such projects must be approved by USDA as "consistent with the conservation of soil, water quality, and wildlife habitat." Landowners should consult with the Farm Service Agency and/or the Natural Resources Conservation Service regarding the placement of turbines or other structures on CRP acreage. The lease should also specify which party is liable for any penalties or fines imposed for violations of CRP regulations.

D. Is the turbine or an associated structure located on land enrolled in USDA commodity programs (i.e., on Crop Acreage Base)?

❑ Yes ❑ No

If the turbine or other facilities are located on land that is enrolled in USDA commodity programs, how will the developer's use of that land affect the landowner's farm program payments? Does the lease payment received by the landowner justify the loss of commodity program payments? Landowners should consult with the Farm Service Agency to determine the impact of the placement of a turbine or associated facility on commodity program payments.

IX. Choice of Law/Choice of Venue Clauses

A. Does the lease contain a choice of law clause or choice of venue clause?

☐ Yes ☐ No

If you are considering a lease with a developer from outside of the state, you should examine the lease for both a choice of law clause and a choice of venue clause. A choice of law clause might specify that any litigation that arises under the contract must apply the laws of the state in which the developer is located. While the dispute might be heard in a North Dakota court, the court would be required to apply the laws of the developer's home state. If the lease contains a choice of venue clause, the parties would be required to appear at a court in the developer's home state. It is usually in the landowner's best interest to have any legal dispute resolved under North Dakota law by a North Dakota court.

X. Termination of the Lease

A. Does the lease specify the events that permit the developer to terminate the contract?

☐ Yes ☐ No

A particularly important issue is whether the developer is permitted to terminate the contract "at any time without cause." If so, what are the landowner's rights to any remaining payments under the contract?

B. Does the lease specify the landowner's rights of termination?

☐ Yes ☐ No

Particular attention should be paid to how the landowner must exercise the right of termination.

C. Is the process defined for the removal of the turbine and associated facilities (i.e., structures, roads) at the conclusion of the lease?

☐ Yes ☐ No

D. Who must pay the costs associated with the removal of the turbine and facilities at the conclusion of the lease?

☐ Developer ☐ Landowner

The cost of installing and removing a wind turbine can be substantial. The lease should specify which party will pay the costs of removing the turbine and associated facilities when the lease is terminated. Many leases require the developer to pay these costs and to retain funds in escrow that will be sufficient to pay these costs. The lease should also specify the condition of the land at the end of the removal/clean up process.

XI. Other issues related to the lease

There are many more issues that should be considered in negotiating a lease for electricity production from wind. Only the assistance of competent legal counsel can address the full list of issues that should be considered in such a lease. The following is a partial list of other issues that should be considered.

A. Does the lease grant broad access and use of the land parcels to the developer? In general, such provisions should be narrowly written to limit the use of the land to only those portions necessary for the conduct of the project.

B. Is the landowner an LLC or other form of business organization other than a sole proprietorship? Your state's contract law may treat contracts between an LLC and a developer in a different manner than discussed here.

C. Does the lease grant a perpetual easement to the developer for the use of the land? Such provisions are usually considered unfavorable to a landowner and may violate North Dakota law as a violation of the "rule

against perpetuities."

D. Does the lease address the issue of default during the project? What are the landowner's rights if the developer defaults, leaving an unfinished project?

E. Does the lease require that disputes be submitted to mediation or arbitration before a lawsuit can be filed? If so, what is the mediation/arbitration process?

F. Does the lease include any other form of mineral rights or property rights? Be sure that the lease includes only wind use rights unless you are compensated for the purchase of other rights.

G. Does the lease specify which party will be responsible for the enforcement of trespassing laws and the actions of trespassers?

H. Does the lease require bonding by either party during the project?

I. In the event of a change in a law or regulation that invalidates one portion of the lease, does the remainder of the lease apply as written?

J. Does the lease require the developer to include the landowner on the developer's insurance policy?

XII. Conclusion

The development of electricity generated from wind has the potential to be a viable industry in Michigan. To participate in this industry, landowners should be aware of the economic benefits and the potential legal risks associated with negotiating a contract for the generation of electricity from wind. Above all, landowners should be aware that signing a wind contract should be a matter of negotiation. The landowner should be aware of the terms of the lease and should seek greater compensation for terms of the lease that are less favorable to the landowner. The lease provisions listed above, along with many other aspects of the lease, should be considered carefully given the long term of commitment required by many leases. Negotiation of an equitable lease requires the assistance of effective legal counsel. If satisfactory terms or compensation are not provided in the lease, new or additional terms should be negotiated or the lease should not be signed.

XII. Other Resources

Noling, Bernard. *Guidelines for Landowners in Negotiating Wind Energy Leases.* Speech, Southwest Kansas Royalty Owners Association, 2003. (Retired attorney reflects on experience of reviewing wind energy leases in Texas and Kansas and the problems that landowners can experience with a poorly negotiated lease – very readable and a must-read for any landowner). Available at http://www.swkroa.com/formspublications.html

McEowen, Roger A. *Wind Energy Production: Legal Issues and Related Concerns for Landowners.* Center for Agricultural Law and Taxation, Iowa State University. Available at http://www.calt.iastate.edu/windenergy.htm

Windustry. *Leasing Your Land to a Developer.* Available at http://www.windustry.com/leases

Windustry. *Leases and Easements.* (Includes "webinar" presentations from Iowa State University and Colorado State University). Available at http://www.windustry.com/taxonomy/term/120

Stoel Rives, LLP, Attorneys at Law. *The Law of Wind: A Guide to Business and Legal Issues.*2006. (If your attorney is unfamiliar with wind energy leases, be sure to direct him/her to this publication.) Available at http://www.swkroa.com/formspublications.html (Also available at the windustry.com website above.)

Attachment #3

Natural Resources Committee of the North Dakota House
January 29, 2009 Hearing on HB 1509
Testimony of Colleen Rice

Chairman Porter, Committee Members, including for purposes of full disclosure my cousin, Duane DeKrey, my name is Colleen Rice and I currently reside in Las Vegas, Nevada. I'm here because I'm a North Dakota native and my 82 year old mother, Nora Sannes of Fargo, asked me to come. We support HB 1509 because it will help level the playing field between North Dakota landowners and wind developers.

I grew up on a farm in Barnes County and after student teaching for Committee Member Myxter in 1978, went on to law school with the goal of helping farm widows save their farms through better estate plans. Changes in the tax code mitigated that problem before I graduated and I ended up in general practice in Fargo-Moorhead for 11 years before moving to Las Vegas and going in-house at the regulated electric utility serving southern Nevada where I've been for the last 14 years, primarily responsible for drafting and litigating contracts.

I am here today because my mother, who still owns the family farm in Barnes County, was approached by a wind development and asked to sign a 44 page single spaced wind energy option and easement. I asked her who the developer was and was relieved to learn that although it was a joint project, that one of the developers was the same company that my employer partnered with to develop a wind project in the southwest. It's a very reputable company and I was familiar with the project agreements used in the southwest. That familiarity gave me a sense of security and that sense of security made my disappointment even more profound once I spent the 20+ hours needed to study the contract my mom and other North Dakota farmers had been asked to sign. And because I'm not a wind expert, I then paid $4,000 to a firm specializing in wind projects to review my analysis. They agreed that several of the terms were consistently worse than market – speaking from the farmer's perspective. There were terms in that contract that could end up causing Mom to lose the farm and here's the problem – although my mother hasn't signed we're told that about 80 of our neighbors have.

I'm not here to "get a better deal" for my mom. I'm here to tell you how I came to conclude that North Dakota farmers need state intervention in order to negotiate on a level playing field with wind developers. Although dormant for many years, I guess I still have a desire to use my legal skills to benefit North Dakota farmers.

Let me give you a couple examples of terms I expect you will be surprised to find in a North Dakota wind easement or lease. First, the indemnity provision. Just the word is enough to cause a yawn but it's an important concept that generates real risk. Indemnity is the contractual obligation to make the other party whole in certain situations described by the contract. The clauses are typically mutual, meaning that your obligation to indemnify the other party is consistent with your right to be indemnified. That is the typical approach used in energy contracts and I've been told by lawyers with significant

wind farm experience, that it is also a typical approach in other states for wind leases and easements.

But the indemnity provision in the contract given to my mother, and signed by those 80 neighbors, was not mutual. In those agreements, if the farmer caused the developer to suffer any loss, whether or not the farmer was negligent, the farmer was obligated to fully compensate the developer, even for lost profit. On the other hand, before the farmer could be indemnified by the developer, he'd have to first prove that the developer was negligent or guilty of willful misconduct, and even then he'd be entitled to a much more narrow scope of recovery. Even recovery of crop loss was limited to the few months of initial construction with no right to recover for crop loss during the remaining 40 years of the contract. Should God forbid, Mom's agent run a huge piece of equipment into the turbine and cause it to fall, mom's indemnity obligation would be greater then the value of her five quarters of land. There wasn't even a provision limiting the indemnity obligation to the amount not covered by insurance. But if the developer's employee performing routine maintenance dropped a cigarette and started a prairie fire wiping out a year's worth of crop, the contract protected the developer from indemnifying her for this crop loss.

One more example – I'm sure you've heard of act of God or force majeure clauses. These are provisions that say if an act of God prevents a party from performing, that their failure to perform is forgiven. If the bridge has washed out preventing the railroad from completing its delivery, its failure to perform is not a breach. These are typical clauses in energy contracts but typically, they are drafted so that the failure to make payments is not an obligation that can be forgiven by virtue of an act of God. That however was not the case in this North Dakota wind easement. This contract, and the one signed by 80 of our neighbors, excuses the developer from paying the farmer if a change in law or regulation increases their costs such that they can't pay everyone else and have enough left over to pay the farmer. The farmer, without whom there would be no place to install the tower, bears the ultimate risk that changes of law increase decommissioning costs, increase the developer's taxes or decreases its tax credits. Those risks are firmly placed on the North Dakota farmer and the farmer will go unpaid even if the developer did not try to cut costs elsewhere. Not paying the farmer in this situation would be forgiven and not a breach and therefore the farmer would be helpless.

Studying the contract given to these Barnes County farmers was enough to convince me that there is a problem that state government should help solve. The problem is this - North Dakota farmers are being approached by sophisticated wind developers and are being encouraged to sign contracts, either leases or easements, which subject the farmers to legal risk that could one day cause them to lose their farms. I have the utmost respect for farmers, but frankly they are no match for contracts drafted by the big city law firms representing wind developers. HB 1509 would go a long way toward solving this problem.

HB 1509 requires the PSC to adopt rules establishing a wind developer Code of Conduct and that developers must then provide that Code of Conduct to landowners. It is difficult

to argue against this concept. First, all interested parties may take place in the rulemaking out of which the Code of Conduct will be produced. But second, a Code of Conduct should prove no burden whatsoever to reputable developers. In fact, it should help level the playing field between reputable developers and their less forthcoming competition.

In addition, now is the perfect time to conduct the rulemaking that would lead to the required Code of Conduct. There is a lull right now in business activity as we wait for the credit markets to recover. Once that recovery occurs, the wind industry is bound to take off given its support from the new administration. And North Dakota, given its #1 ranking in wind, will be at the center of activity. Using this temporary lull to prepare the Code of Conduct in anticipation of the upcoming rush would be time very well spent.

A Code of Conduct will allow the State to directly communicate with individual landowners at exactly the time and place when that communication will do the most good – when the a developer presents a proposed lease to the landowner. You frequently hear that developers try to rush farmers into signing. I have heard of multiple instances when farmers signed without even reading the wind developer's contract. In order to discourage that, I'd like to see the Code of Conduct start out with the following:

"This is a very important agreement that our lawyers have drafted that will bind you and your land for 40 years. It is complicated but you need to thoroughly understand it before signing. We strongly encourage you to hire a lawyer to explain this agreement to you. Should you hire an attorney to review it, we will reimburse you your attorney's fees up to X. You may want to talk with your neighbors about the wind project and several of you may choose to hire the same lawyer to negotiate changes on your behalf."

A message like that should prevent farmers from trusting what they're told and simply signing on the dotted line without first reading.

But HB 1509 requires more than a simple Code of Conduct. The required PSC rulemaking will also result in basic terms being standardized for those developers adopting the Code of Conduct. This should go a long way toward balancing the playing field between farmers and wind developers. At present, the deck is stacked against the landowner.

It's difficult for one landowner to individually negotiate a better deal with a wind developer and here's one of the main reasons why -- wind projects cover the land of several individual owners and the developer will need a contract with each of them. The developer won't want to be tied to several different contracts for the same development and so its lawyers will draft standard form contracts that every landowner will be asked to sign. This makes it more difficult for an individual farmer to negotiate extensive changes and I have to agree that it would very difficult to administer one project subject to several different contracts. Developers signing on to the Code of Conduct will simply drop in the mandated Code of Conduct terms into their standard agreements.

SB 1509 states that the PSC may include "basic terms" in the Code of Conduct. "Basic Terms" would likely encompass those terms that require the PSC to exercise its special expertise such as the decommissioning requirements. I hope that "basic terms" would also include things like insurance requirements, mutual indemnity provisions and property taxes because these are terms that need to be drafted correctly, or a farmer could end up losing his farm. Let me give you just one more example to convey how important these basic terms are.

Wind easements and leases typically contain an insurance provision requiring the developer to carry insurance on the wind tower but that is not enough to protect the farmer. I learned the following story from the wind developer attorney we recently hired. Farmers frequently asked his former client what would happen if their tractor accidentally destroyed a wind tower. They were told not to worry because insurance would cover the loss. What made this lawyer uncomfortable is that although insurance would cover the developer's loss, that unless the lease or easement contained a waiver of subrogation clause, that upon paying for the loss, the developer's insurer would then pursue a subrogation action against the farmer to recover the amount it paid. As I mentioned before, it would take several quarters of North Dakota farm land to equal the cost of one turbine. In addition, the farmer should insist that the developer be required to name the farmer as an additional insured under its policy so that the farmer's losses may also be covered. In case you're wondering, the contract given to my mother and apparently signed by our 80 neighbors, did not contain either a waiver of subrogation clause or an additional insured provision.

Lastly, I have one word of advice as you continue your work on HB 1509. Please consider amending it to include not only wind energy leases, but wind easements as well. Limiting its scope to just leases creates a loophole big enough to circumvent the very purpose of the statute. As I mentioned earlier, the contract given to my mother to sign was an easement and not a lease.

I've always been very proud of North Dakota's history of protecting its residents from being taken advantage of by outside business interests. HB 1509 would continue that important legacy. Thank you for allowing me to testify and giving me a chance to encourage you to vote in favor of HB 1509.

#4

NDARE
North Dakota Alliance for Renewable Energy, Inc.

Testimony on House Bill 1509
ND House Natural Resources Committee
Bill Kalanek
North Dakota Alliance for Renewable Energy

Good Morning Chairman Porter and members of the House Natural Resources committee. My name is Bill Kalanek and I'm here today representing the North Dakota Alliance for Renewable Energy (NDARE).

NDARE comprises representatives from commodity groups, farm organizations, investor-owned utilities, rural electric cooperatives, state agencies, economic development groups, universities, banks, manufacturers, and conservation and environmental organizations. Partnerships among these stakeholders are central to NDARE's approach. Several of NDARE's members also served on North Dakota's EMPOWER Commission.

With the wind industry growing quickly in North Dakota, the state has yet to establish a framework for companies and landowners to operate under that safeguards the rights and needs of both parties. This being the case, North Dakota faces a number of challenges in developing the industry in a manner that maximizes economic benefits, preserves property and commercial rights, and addresses other public concerns. NDARE feels that sustaining landowner and public support for wind energy and projects is essential to developing a healthy wind industry in North Dakota.

When NDARE met to discuss what its priorities would be in 2009 a single goal emerged in our discussions of Wind development. "Protect the wind rights and interests of landowners and the commercial rights of wind energy project developers and owners." In North Dakota oil and gas development, there are policies to ensure a fair deal for landowners who share the resource. Such policies have yet to be put in place for wind. NDARE feels that House Bill 1509 is a sensible first step that would encourage wind developers' voluntary participation in a process that would serve to ensure confidence as North Dakota's landowners enter into long term agreements to develop our country's largest wind resource

With that, the North Dakota Alliance for Renewable Energy respectfully requests that the committee give House Bill 1509 a Do Pass recommendation.

Thank you.

Testimony in Favor of HB 1509: A Code of Conduct for Wind Energy Leases
House Natural Resources Committee
January 29, 2009

#5

Brad Crabtree
Board Member, ND Alliance for Renewable Energy
Township Officer, Spring Valley Township, Dickey County
(701) 647-2041, bcrabtree@gpisd.net

Chairman Porter and Committee members, please accept this written testimony and my apology for not appearing in person due to professional and ranch-related obligations.

I testify in support of HB 1509 and the establishment of a code of conduct for wind development to be developed by the Public Service Commission with broad industry, landowner, and other public input. It is a transparent and voluntary mechanism that will protect the reputation and trust of the wind industry among North Dakota's landowners. This bill is endorsed by the Alliance for Renewable Energy and the result of extensive discussions over several years among representatives of the utility industry, agriculture, renewable energy and other interests. NDARE members issued their recommendation for a code of conduct in response to growing concerns about questionable contracts, manipulative practices and a general lack of information and transparency for landowners to make wise decisions regarding wind energy development on their land.

Initially, when these concerns were first brought to the Legislative Assembly earlier in this decade, they were dismissed as isolated examples or issues that are not the business of state government. However, evidence of questionable contracts and practices has become widespread, indeed pervasive, in our state and a growing topic of local concern and even conflict. This is not surprising. Landowners have access to far less information than developers, and landowners fear that they must accept a developer's terms, lest they lose any prospect of wind turbines being sited on their land. In other words, better a bad contract than no money at all. Some developers, though clearly not all, intentionally foster that perception and exploit what is an unequal relationship and lack of information in many different ways, as others will surely testify to today.

NDARE members recognize that legislators are understandably reluctant to dictate private contractual relationships between developers and landowners. But, the other extreme, *caveat emptor,* or buyer beware, is not acceptable either. There are many examples of policy-makers putting protections in place for parties to private contracts; indeed, this proposed code of conduct looks modest by comparison. PSC Commissioners would develop the code of conduct with input from all interested parties. Wind developers, in turn, would not be required to abide by the code of conduct, but merely inform landowners whether they do or not. Landowners can then make their own determination whether to proceed. For wind developers who value transparency and best practices with landowners, this code of conduct will not effect their business—except to protect their reputation from bad apples.

North Dakota has the potential for large-scale wind energy development and the economic development benefit it brings—much, much greater benefit than what we have experienced to date. However, if landowners sour on wind development and mistrust of the industry emerges, that potential will be lost. Wind farms do not get built without robust local and landowner support. This bill will help safeguard that support.

Thank you, and I respectfully urge a do-pass on this bill.

#6

NORTH DAKOTA
Farmers Union

PO Box 2136 • 1415 12th Ave SE
Jamestown ND 58401
800-366-8331 • 701-252-2341
www.ndfu.org

January 28, 2009

HB 1509
Representative Todd Porter, Chairman
House Natural Resources Committee

Chairman Porter and members of House Natural Resources Committee,

My name is Kayla Pulvermacher; I represent the members of North Dakota Farmers Union. I am here to support House Bill 1509.

North Dakota Farmers Union recognizes North Dakota's vast wind resources and believes our state has enormous potential for generating electricity from wind. Therefore, wind energy holds income potential for farmers and rural landowners.

Because of this income potential for producers, we encourage efforts to educate North Dakota farmers about their wind rights. Establishing a code of conduct is an important step in the right direction for protecting North Dakota producers and landowners.

North Dakota Farmers Union urges a "do pass" on HB 1509. Thank you.

#7

House Bill 1509

Presented by: **Illona A. Jeffcoat-Sacco**
General Counsel
Public Service Commission

Before: **House Natural Resources Committee**
Honorable Todd K. Porter, Chairman

Date: **29 January 2009**

TESTIMONY

Mr. Chairman and committee members, I am Illona A. Jeffcoat-Sacco, General Counsel for the Public Service Commission. The Commission asked me to appear today to share some of our concerns about House Bill 1509.

House Bill 1509 would require the Commission to adopt rules establishing a code of conduct for wind lessees and the filing of code of conduct pledges with the Commission. We do not believe the Public Service Commission is the appropriate agency to implement these provisions.

The Commission is a regulatory agency with jurisdiction over several types of energy development and utility services in North Dakota. These include coal mining, energy conversion and transmission facility siting, and oversight of generation, transmission and distribution investment for regulated gas and electric utilities. This regulatory authority does not extend to enforcement of standards affecting the relationship between landowners and developers.

The siting act addresses land acquisition practices in three areas but the Commission is not charged with enforcing those provisions. Likewise, the Commission's authority to approve regulated utility company investment does not

include any enforcement authority regarding land acquisition for that investment. Finally, coal and surface leases are reviewed to ensure a mining company has the necessary landowner consents before a mining permit is issued, but the Commission does not enforce any acquisition standards or lease provisions.

Since the Commission is not the appropriate agency to implement standards governing landowner/developer relations, we request that the Committee remove the Commission from the bill.

This concludes my testimony. I will be happy to answer any questions you may have.

Attachment #8

Public Service Commission
State of North Dakota

COMMISSIONERS

Kevin Cramer
Tony Clark
Brian P. Kalk

Executive Secretary
Darrell Nitschke

600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480
Web: www.nd.gov/psc
E-mail: ndpsc@nd.gov
TDD 800-366-6888 or 711
Fax 701-328-2410
Phone 701-328-2400

11 February 2009

Honorable Todd Porter, Chairman
Natural Resources Committee
North Dakota House
600 East Boulevard Avenue
Bismarck, ND 58505

Re: House Bill 1509

Dear Chairman Porter:

As you know from our testimony on House Bill 1509, we do not believe the Public Service Commission is the appropriate agency to establish and implement a code of conduct for wind lessees or the other requirement in House Bill 1509.

The Commission is a regulatory agency with jurisdiction over several types of energy development and utility services in North Dakota. This regulatory authority does not extend to enforcement of standards affecting the relationship between landowners and developers. In some cases, standards of conduct are imposed by statute on licensees and the licensing authority would then enforce those standards. In other cases, industry associations often self-regulate by asking their members to comply with a code of conduct written by the members themselves. House Bill 1509 fits neither scenario.

An analogous situation exists concerning the acquisition of mineral rights in the oil and gas business. A national industry association with state affiliates, the American Association of Petroleum Landmen, offers several levels of membership based on experience and training, a certification option, continuing education and professional development tools, standard lease and contract forms (some by state) and a code of conduct for its members. We see this option as a better and more realistic option than that proposed by House Bill 1509.

We find additional guidance on how to more appropriately effect the objectives of House Bill 1509 by reviewing some of the provisions of N.D.C.C. Chapter 47-16, governing real property leases. While that chapter governs residential and farm leases, it also prescribes requirements for oil and gas leases, with provisions governing forfeiture, surrender and termination, recording requirements, payment obligations, the royalty owner's right to inspect records, and others. A similar approach is the most appropriate way for the legislature to handle lease or easement requirements it deems necessary for wind

development. Some of these have already been enacted in N.D.C.C. Chapter 17-04 and the Commission has no jurisdiction over and does not enforce any of the requirements of that chapter.

Enacting House Bill 1509 and requiring the Commission to promulgate rules for wind development leases and developer conduct would be like requiring the North Dakota Industrial Commission to promulgate rules on oil and gas lease terms and the acquisition conduct of petroleum landmen. It would, in essence, require the Attorney General and Assistant Attorneys General to provide private legal assistance to landowners. Rather than focusing on ensuring safe and environmentally sound energy development, such legislation would focus state resources on a function better handled by individual landowners and their private attorneys.

As we mentioned in testimony, the siting act already addresses land acquisition practices in three areas but the Commission is not charged with enforcing those provisions. Existing language in the siting act prohibits "any harassment, threat, intimidation, misrepresentation, deception, fraud, or other unfair tactics to induce the owner of the land to be affected by the facility to grant or agree to any easements." The provision is enforced by district court. If a court ruling against the company is provided to the Commission, the Commission can revoke or deny a siting authority.

The Commission is charged with investigating all of the environmental and socio-economic factors involved in developing wind and other energy resources under its jurisdiction. This function is not sufficiently compatible with a function that is more akin to licensing than environmental oversight. We strongly believe that we are not the appropriate agency to implement standards governing landowner/developer relations or lease and easement provisions. We respectfully request that the Committee remove the Commission from the bill.

Best regards,

Illona A. Jeffcoat-Sacco
General Counsel

c: Rep. Chuck Damschen, Vice Chairman
Rep. Duane DeKrey
Rep. Lyle Hanson
Rep. Bob Hunskor
Rep. Scot Kelsh
Rep. Darrell D. Nottestad
Rep. Donald L. Clark
Rep. David Drovdal
Rep. Curt Hofstad
Rep. George J. Keiser
Rep. Lee Myxter
Rep. Louis Pinkerton

TESTIMONY

HOUSE BILL 1509

REP. JON NELSON

Good Morning Chairman Lyson and members of the Senate Natural Resource Committee. My name is Jon Nelson and I serve District 7 in the ND House of Representatives and appear before you this morning to introduce HB 1509.

Engrossed HB 1509 will establish rules developing a code of conduct for lessees in the negotiation of wind lease agreements with landowners.

As you know, I am a strong advocate for wind energy development in this state and I fully support its responsible growth. Landowners, as well as the general public, expect that of the lignite industry as well as the oil and gas industry, and we have passed strong landowner protections in that regard. As the wind industry continues to build in the state, I believe the citizens of North Dakota expect no less from this industry.

We have a strong legacy in North Dakota of protecting our citizen's property rights. The engrossed bill that is before you today will do just that.

It is now my intention to turn over the podium to landowners and industry experts from across the state to explain the need for this legislation and to propose amendments that have been agreed upon by the utility industry as well as the surface owners whose land will be affected by the development of commercial wind energy generation in the state.

I appreciate the opportunity to appear for you today and urge your committee to give HB 1509 a DO PASS recommendation. Thank you.

#3

Natural Resources Committee of the North Dakota Senate
March 13, 2009 Hearing on HB 1509
Testimony of Colleen Rice

Chairman Lyson, Committee Members, my name is Colleen Rice and I currently reside in Las Vegas, Nevada. I'm a North Dakota native and my 81 year old mother, Nora Sannes of Fargo, asked me to come here today. We support HB 1509 because we believe that something needs to be done to help level the playing field between North Dakota landowners and wind developers and we believe that passing HB 1509 would be a step in the right direction.

I grew up on a farm in Barnes County and after graduating from NDSU, went to law school at the University of Minnesota with the goal of helping farm widows save their farms through better estate plans. Changes in the tax code mitigated that problem before I graduated and I ended up in general practice in Fargo-Moorhead for several years before moving to Las Vegas and going in-house at the regulated electric utility serving southern Nevada. I'm primarily responsible for drafting and helping litigate contracts but I like to think that I keep all that neon glowing.

My trip here today really started last spring when my mother asked me to review the 44 page single spaced easement for a wind project being built in Barnes County. She said that the developer had been to her home in Fargo to talk to my 94 year old dad about signing his land up for this project. The developer even brought along the man who rents Dad's land, someone who Dad really respected, who had already put some of his land into the project. Mom said that Dad was ready to sign that day but listened when she asked him to wait until I had a chance to review the documents.

My client is co-developing a wind farm on the Nevada Idaho border and I was familiar with those documents, so I was pleased to learn that this same company, a well respected British company, was also a co-developer on this Barnes County project. I can't talk about the Nevada agreements due to attorney client privilege, but I can say that I expected the Barnes County easement would be one-sided but fair. It took me a couple months to even read the easement because I expected no real problems. Dad actually died in the interim. And when I finally read it - it turned out to be one of the most unfair contracts I had ever seen. I was tempted to jump to the conclusion that North Dakotans were being taken advantage of, but knew more information was needed to make that call. And so here's what I did.

1. I tried to collect other wind leases and easements from other parts of the country through the outside law firms my client relies on and my own internet searches. Given attorney client privilege and tough confidentiality provisions, this is very difficult to do and I only ended up with about 5 of them.

2. Because I couldn't get my hands on enough contracts to figure out for myself what a "market" wind easement was, I hired a well recognized law firm specializing in wind projects. In fact this firm also represented this same

developer on some of its other projects around the country. By now, I had already spent at least 20 hours digesting this very complex agreement and had a list of roughly 75 things I wanted changed. The reviewing lawyer had literally worked on hundreds of wind easements and leases from around the country and agreed that there were 42 changes that I should be able to get. In other words – it would take 42 changes to turn this into a "market" agreement. Of the laundry list of elements in the current version of HB 1509 that help make a wind easement fair – the taxation element is the only one clearly present in this agreement.

This research convinced me that the Barnes County easement given to my mother was far below market, but when I attempted to negotiate changes – I was told that 80 of our former neighbors had already signed a very similar contract. That's what convinced me that yes, North Dakota farmers are being taken advantage of by wind developers.

You need to understand that those neighbors can't tell you about this contract. That's because it contains a very strict confidentiality provision. And most neighbors had to sign a confidentiality agreement to even look at the contract, so even those few who didn't sign shouldn't be talking about it. I can be here for two reasons - the developer forgot to ask Mom and Dad to sign a confidentiality agreement before they were given the contract and because Mom hasn't signed up. She would love the extra money the developer keeps talking about but there's simply too much risk.

We haven't even talked about contract terms and think how different this story would have been if HB 1509 had been law last spring. There wouldn't have been any pressure on my 94 year old Dad to sign up for something he hadn't read because of the 5 day required delay. There would have been a cover sheet advising him to hire a lawyer. He wouldn't have needed Mom to insist that he really needed to let me take a look. It would have been in drafted in clearer English so it wouldn't have taken me more than 20 hours to digest it. And just maybe some of those 80 neighbors would have taken the cover sheet's advice and jointly hired a lawyer to look out for their interests.

But HB 1509 would have also impacted the easement's terms. HB 1509 lists some specific concepts that need to be in wind easements that will help keep them fair. This is not a pro-farmer anti-wind developer list. It is a fairness list. HB 1509 will help make North Dakota wind easements and leases more like those out in the market.

A review of this Barnes County easement demonstrates how much HB 1509 is needed. (1) The non-mutual indemnity provisions would cause my neighbors to be left holding the bag when the developer accidentally destroys their crops or if a turbine blade falls off and a family member happens to be beneath it.[1] (2) A cleverly crafted Force Majeure provision will surprise my neighbors when they don't get paid if the developer's costs increase too much due to changes in law over the next 40 years.[2] (3) No waiver of

[1] See §10.1 Grantee's Indemnity; §9.3 Repair of Improvements and Reimbursement for Crop Damages and compare with §11.6 Owner's Indemnity.

[2] Page 3 of §1, Force Majeure definition; § 19.3 Force Majeure

subrogation language could cause them to lose their equity in the farm should the developer's insurance company sue them.[3] (4) A provision giving the developer no obligation to actually run the turbines could make them look at a moth balled turbine year after year with no ability to terminate the contract.[4]

The indemnity provisions in this Barnes County easement are non-mutual and expand the farmer's legal liability while significantly restricting the developer's legal liability. Indemnity clauses are typically mutual, meaning that your obligation to indemnify the other party is consistent with your right to be indemnified. That is the typical approach used in energy contracts and I've been told by lawyers with significant wind farm experience, that it is also a typical approach in wind leases and easements. HB 1509 requires mutuality.

In these Barnes County easements, the farmer has to indemnify the developer if the farmer caused the developer to suffer any physical damage to property or person, whether or not the farmer was negligent.[5] This is how the contract gives the farmer more liability than the law otherwise does.

On the other hand, the easement restricts the developer's legal liability.[6] The easement forces the farmer to first prove that the developer was negligent or guilty of willful misconduct, but that's not enough to get full recovery of damages. The easement protects the developer from paying for crop loss, even if it's due to his willful misconduct, if the crop loss occurred after those first few months it takes to construct the turbines. Secondly, the easement protects the developer from ever paying for property damage or personal injury "attributable to dangers associated with electrical generation facilities". I admire the wind developer attorney who came up with that phrase – but it is egregiously unfair.

Equally clever is how the farmer's burden to bear responsibility for the developer's increased costs due to changes in law is hidden in the Force Majeure definition.[7] Force Majeure is the provision that says if an act of God prevents a party from performing, that their failure to perform is forgiven. These are typical clauses in energy contracts but typically, they are drafted so that the failure to make payments is not an obligation that can be forgiven by virtue of an act of God. That however is not the case in this North Dakota wind easement.

I'll quote the clever language – Force Majeure is defined to include "any change in applicable law that makes it impossible for a Party to perform its obligations hereunder in a commercially reasonable manner." Think about it -- it wouldn't be commercially reasonable to pay the farmer if it would cause the developer to default on another obligation. And so the farmer, who's already bearing the full brunt of increasing agri-

---

[3] §10.2 Insurance
[4] §19.1 Exclusivity
[5] §11.6 Owner's Indemnity
[6] §10.1 Grantee's Indemnity; §9.3 Repair of Improvements and Reimbursement for Crop Damages
[7] Page 3 of §1, Force Majeure definition

business expenses, will be surprised to learn when he doesn't get a check one year because legal changes have increased the developer's decommissioning costs or increased the developer's taxes or decreased its tax credits. Change in law provisions are very difficult to draft and hotly negotiated. I know that the wind developer's lawyer who figured out how to shift this risk to the landowner with the simple insertion of one clause in the force majeure definition is pretty proud of himself. It's slick - but grossly unfair. SB 1509 requires that developer be clear about circumstance that would allow it to withhold payments from the property owner.

There's no fancy drafting in the Barnes County easement with respect to the waiver of subrogation – the obligation simply doesn't exist.[8] I understand from a lawyer who used to represent a wind developer but now works for the same utility I do, that farmers would frequently asked his former client what would happen if their tractor accidentally destroyed a wind tower or damaged some other piece of very expensive equipment. They were told not to worry because insurance would cover the loss. What made this lawyer uncomfortable is that although insurance would cover the developer's loss, that unless the lease or easement contained a waiver of subrogation clause, that upon paying for the loss, the developer's insurer would then pursue a subrogation action against the farmer to recover the amount it paid. SB 1509 requires that subrogation be waived by both the farmer and the developer.

One last example. In Barnes County, should those turbines ever be mothballed, for any period of time, the farmers will have no ability to terminate the easement. Why? This easement, categorically, does no require the developer to construct anything, and if turbines are constructed, the developer is not required to operate them or to continue operating them.[9] With no obligation there can be no breach and therefore no right to any remedy. The current version of HB 1509 requires that the property have the right to terminate after 3 years of inactivity.

North Dakota leads the nation in the potential for developing wind as a power source. You can also lead the nation in taking steps to protect your landowners. I can see the Las Vegas Strip from my office but it's decorated with pictures of North Dakota. Thank you for the honor of allowing me to testify and giving me this opportunity to encourage you to vote in favor of HB 1509.

[8] §10.2 Insurance

NORTH DAKOTA
WIND ENERGY OPTION AND EASEMENT AGREEMENT

THIS WIND ENERGY OPTION AND EASEMENT AGREEMENT ("**Agreement**") is dated as of _____, 20___, and is made by and between Nora Sannes, a single person [marital status] ("**Owner**") and RES NORTH AMERICA LEASING, LLC, a Delaware limited liability company ("**Grantee**").

Recitals:

A. Owner owns that certain real property located in Barnes County, North Dakota, as more particularly described herein.

B. Grantee desires to obtain an option to obtain the right to use the portions of the Premises (as hereinafter defined) for, among other purposes, the operation of Windpower Facilities (as hereinafter defined).

C. Subject to the terms and provisions of this Agreement, it is the intent of the parties that Grantee be permitted to conduct certain activities on the Premises (as hereinafter defined) or a portion thereof, as specified in this Agreement, and it is further the intent of the parties that Grantee's use of the Premises, or a portion thereof, shall not exclude or prevent the conduct by Owner of other lawful activities on the Premises, provided that such activities do not fall within the express prohibitions of this Agreement or adversely affect in a material manner the reasonable exercise by Grantee of its rights set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and obligations of the parties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

"**Access Easement**" means the easement granted to Grantee under the terms of Section 12.1.

"**Access Strip**" shall mean up to a [60] ft. wide strip of land within the area subject to the Access Easement used for the purpose of Grantee's ingress and egress to Turbine Sites, Overhead Line Easement areas, Building Sites, or Construction Compound Areas from a public road right of way or a road existing on the Premises as of the date hereof and for the purpose of the construction, maintenance, repair, replacement, and operation of underground Transmission Facilities.

"**Annual Payment**" means the consideration for the grant of the Option and for Grantee's use of the Easement Area prior to the Commercial Operation Date. The Annual Payment for each year of the Option Period is set out in Section 7.1.

"**Assignee**" means any assignee or successor to Grantee of any interest in this Agreement.

"**Building Site**" means the location of a substation or other permanent building to be used by Grantee for storage, operations, maintenance and other similar activities related to the Project.

"**Claim**" means any claim, action, suit, proceeding, loss, cost, damages, liability (including, without limitation, sums paid in settlement of claims), expense (including, without

"Environmental Laws" means all statutes, ordinances, orders, rules and regulations of all federal, state or local governmental agencies relating to the use, generation, manufacture, installation, handling, release, discharge, storage or disposal of Hazardous Materials, including, but not limited to, the Federal Water Pollution Act, as amended (33 U.S.C. § 1251 et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. § 6901 et seq.), the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601 et seq.), and the Hazardous Materials Transportation Act, as amended (49 U.S.C. § 1801 et seq.).

"Event of Default" means any failure or default by Grantee under this Agreement, following the expiration of all applicable notice, grace, and cure periods.

"Exercise Notice" means a written notice in a form substantially similar to that set forth in Exhibit B

"Expiration Notice" has the meaning set forth in 6.2.

"Force Majeure" means any occurrence beyond the reasonable control of a party, which causes that party to be unable to perform, in whole or in part, an obligation under this Agreement, and which was not anticipated as of the Effective Date, and which could not have been avoided by the exercise of due diligence. Force Majeure includes, but is not limited to: (i) acts of God and natural catastrophes; (ii) actual or threatened civil disturbance, terrorism, war, or riot; (iii) strike or other labor dispute (in which case the affected party shall have no obligation to settle the strike or labor dispute on terms it deems unreasonable); (iv) any change in applicable law or regulation or any order from an authority with appropriate jurisdiction that makes it impossible for a Party to perform its obligations hereunder in a commercially reasonable manner; (v) emergencies declared by or forced curtailment required by the ISO or any other authorized successor or regional transmission organization or any state or federal regulator or legislature; and (vi) physical damage to the transmission system making it impossible to transmit energy from the Project.

"Grantee" means RES North America Leasing, LLC, a Delaware limited liability company, and its successors and assigns.

"Grantee's Estate" means Grantee's or any Assignee's estate and rights under this Agreement (including any easements granted to Grantee any Assignee hereunder).

"Gross Revenues" means the aggregate total revenues actually received by Grantee for sales to the first purchaser that arise or are derived from the Project.

Gross Revenues shall include, but not be limited to: (i) the sale to the first purchaser of electricity generated by the Project; (ii) the sale of any state- or federally-based renewable energy credits directly derived from the Project; and (iii) the proceeds in connection with, under or derived from any agreement, compromise settlement, judgment, or arrangement, relating to the sale, use or other disposition of electricity generated or capable of being generated by the Project (and/or any other related attribute included in the definition of Gross Revenues).

Gross Revenues shall not include any federal tax, production or other credits (including but not limited to PTCs) received by, or paid to, Grantee by any governmental entity or quasi-governmental entity, including without limitation any subsequently created federal renewable energy credits, carbon dioxide credits, emissions credits or any other federal income tax credits,

Revenues, Shared Community Payment, or Owner's proportionate share of Shared Community Payment relating to a fiscal year shall be deemed to be conclusive and binding on the parties following the second anniversary of the last day of such fiscal year.

8. **Taxes.** Grantee shall be liable to Owner for any increase in the real property taxes levied against the Premises attributable to the installation of the Windpower Facilities, including any penalties or interest Owner is required to pay to the taxing authorities as a result of reclassification of the Premises. Owner shall be liable for taxes attributable to facilities installed by Owner or others on the Premises, to the underlying value of the Premises itself, or to a reclassification of the Premises prior to final issuance of all necessary governmental approvals for the installation of Windpower Facilities. Owner and Grantee agree to work together to minimize any reclassification of the Premises and any resulting penalties or interest. To the extent permitted, Grantee shall pay the taxing authority directly for that portion of real property taxes levied against the Premises that is attributable to the installation of the Windpower Facilities. If Grantee may not pay the taxing authority directly for such taxes, then Grantee shall reimburse Owner for such taxes within sixty (60) days of Owner's delivery to Grantee of evidence of such Grantee's payment of such taxes. It is a condition to Owner's right to reimbursement hereunder that Owner submit the real property tax bill to Grantee within two (2) months after Owner receives the bill from the taxing authority. Owner shall pay before delinquency all real property taxes and shall promptly send to Grantee evidence of payment of the same. If Owner fails to do so Grantee shall have the right to pay such taxes on Owner's behalf and any amounts so paid by Grantee may be offset against the amounts next payable by Grantee pursuant to Section 7 above. Grantee may contest the legal validity or amount of any such taxes for which it is responsible under this Agreement, and may institute such proceedings as it considers necessary, provided that Grantee shall bear all expenses in pursuing such contest or proceeding. Owner agrees to render to Grantee all reasonable assistance in contesting the validity or amount of any such taxes, including joining in the signing of any reasonable protests or pleading which Grantee may deem advisable to file.

9. **Construction Activities.**

9.1 Commencement of Construction Activities. If and when this Agreement enters the Easement Term, commencing on the Easement Term Commencement Date, Grantee and its contractors, subcontractors, agents, employees and consultants shall, from that date forward, pursue and execute construction Activities in a safe, professional and diligent manner.

9.2 Location of Windpower Facilities. Grantee shall consult with Owner as to the location of any substations, storage yards, Construction Compound Areas, Building Sites and Access Strips, and Grantee shall use reasonable care to minimize the impact of the location of such facilities on Owner's farming activities in the Premises (as such activities are conducted as of the Effective Date). Except as may be agreed to by Owner, no Access Strips, Overhead Lines Easement areas, substations, Building Areas, or Construction Compound Areas shall be constructed within five hundred (500) feet of a building within the Premises that, as of the Effective Date, is being used as a dwelling. Except as may be agreed to by Owner and as may be permitted under applicable law, no Turbine Sites shall be constructed within one thousand (1,000) feet of a building within the Premises that, as of the Effective Date, is being used as a dwelling.

9.3 Repair of Improvements and Reimbursement for Crop Damages.

(a) The parties anticipate and acknowledge that Owner or Owner's renters may suffer damage to crops, tile, fences, and other property or improvements on the Premises during Construction Activities. Owner and Grantee agree to use best

efforts to coordinate the Construction Activities with Owner's agricultural activities in order to minimize damages to Owner's crops and other property.

(b) In the event that drain tiles, fences, or other improvements are damaged during Construction Activities, Grantee will promptly repair such improvements to the condition that existed immediately prior to the time of damage.

(c) Upon Grantee's determination of the location of any improvements to be constructed (or other incidental construction activity) on the Premises (if any) and the approximate construction schedule, Grantee will inform Owner of such location and schedule (the "Construction Notice"). Subject to Grantee's continuing obligations under subsections (d), (e), and (f) below to reimburse Owner, Grantee shall have the right, in Grantee's sole discretion to modify either the location or schedule for construction of improvements at any time by delivering a subsequent Construction Notice to Owner, which shall supersede the prior Construction Notice in its entirety upon Owner's receipt thereof.

(d) If Owner has not planted a crop in the location of improvements for the growing season in which the improvements will be constructed, Owner shall not be entitled to payments for any loss of crops planted following receipt of the Construction Notice in the locations designated in the Construction Notice. If upon receipt of a Construction Notice, Owner (i) has not planted a crop in the location of improvements designated in the Construction Notice for a growing season in which the improvements will be constructed, but (ii) has applied fertilizer, pesticides, or other similar inputs in the location of such improvements, then Owner will not be entitled to payment for any loss of crops planted following receipt of the Construction Notice, but Grantee will reimburse Owner for the actual cost of the fertilizer, pesticides or other inputs applied in the location of such improvements.

(e) Subject to the provisions of subsection (d) above, Owner and Grantee agree that Grantee shall pay, as liquidated damages for any crop loss and related disruption during Construction Activities, $500.00 per acre on which crops are destroyed or disturbed. Payments for damages to crops shall be paid within thirty (30) days of the determination of the amount of liquidated damages owed.

(f) If Grantee has delivered a Construction Notice to Owner in which Grantee has designated an area for construction of improvements but Grantee does not complete construction of such improvements within one year of the date of the Construction Notice (or, if Grantee has delivered more than one Construction Notice to Owner, the date of the first Construction Notice delivered to Owner) and, as a result of Owner's receipt of the Construction Notice, Owner has foregone the planting of crops within the area designated by Grantee for construction activity, Grantee shall pay Owner the amount of $250.00 per acre for each acre designated for construction activity as liquidated damages for Owner's lost opportunity to farm the area designated for construction activity.

9.4 Release of Premises from Easements. Within one (1) year of the completion of Construction Activities, Grantee shall, by written notice to Owner (the "**Location Notice**"), designate those portions of the Premises upon which Turbine Sites, Transmission Facilities and

other Windpower Facilities, Building Sites, Access Strips and Access Easement areas, Transmission Easement areas, and Overhead Line Easement areas are located within the Premises. Any part of the Premises that is not so designated in the Location Notice shall be deemed released from all Easements other than Operations Easements. Notwithstanding anything to the contrary, the entire Premises shall be subject to the Operations Easements (including the Wind Easement) throughout the Easement Term unless, subsequent to the date of this Agreement, Grantee releases a portion of the Premises from any the Operations Easements by delivering a written instrument which expressly releases such portion from such Operations Easement(s). Following delivery of the Location Notice, Grantee will execute and record, at Grantee's expense, an instrument that evidences the release of portions of the Premises as set forth in this Section 9.4. Such form shall be in a form reasonably acceptable to Grantee. Following completion of Construction Activities and prior to delivery of the Location Notice, Owner shall be permitted to use areas in which Windpower Facilities are not located for any purposes that are consistent with the terms of this Agreement and subject to the terms thereof.

10. Grantee's Representations, Warranties and Covenants.

10.1 Grantee's Indemnity. Grantee shall indemnify, defend, protect and hold Owner harmless from and against any Claims for physical damages to property and for physical injuries to any person, to the extent caused by Grantee or its employees', agents' or contractors' negligence or willful misconduct; provided, however, that Grantee's obligations for damages to crops shall be limited by Section 9.3. In no event shall Grantee be liable or responsible for losses of rent, business opportunities, profits and the like that may result from Owner's loss of use of the portion of the Premises occupied by the Windpower Facilities pursuant to this Agreement, nor for property damage or personal injuries attributable to dangers associated with electrical generating facilities.

10.2 Insurance. Grantee shall maintain commercial general liability insurance insuring Grantee against loss caused by Grantee's use of the Premises, in an amount not less than One Million Dollars ($1,000,000.00) of combined single-limit coverage, and shall provide certificates of this insurance coverage to Owner upon written request.

10.3 Requirements of Governmental Agencies. Grantee shall comply in all material respects with all laws applicable to the Windpower Facilities, but shall have the right, in its sole discretion and at its sole expense, in its name or in Owner's name, to contest the validity or applicability of any law, ordinance, order, rule or regulation of any governmental agency or entity. Grantee shall control any such contest and Owner shall reasonably cooperate with Grantee in such contest, at no out-of-pocket expense to Owner.

10.4 Mechanics' Liens. Grantee shall not permit any mechanics' liens to be filed against the Premises as a result of Grantee's use of the Premises and if any such mechanics' liens are so filed, Grantee shall promptly cause the removal thereof. If Grantee wishes to contest any such lien, Grantee shall, within sixty (60) days after it receives notice of the lien, provide a bond or other security as Owner may reasonably request, or remove such lien from the Premises pursuant to applicable law.

10.5 Grantee's Responsibility for Hazardous Materials. If Grantee places, disposes or releases any Hazardous Material in or onto the Premises and such placement, disposal or release results in the contamination of the Premises, then Grantee shall remediate such Hazardous Materials to the extent ordered to do so by a governmental authority with jurisdiction.

any and all Claims which arise during or after the term of this Agreement as a result of such breach or contamination. This indemnity shall include, without limitation, and Owner shall pay all costs and expenses relating to: (x) any Claim for personal injury (including sickness, disease or death), property damage, nuisance, pollution, contamination, spill or other effect on the environment; (y) any investigation, monitoring, repair, clean-up, treatment or detoxification of the Premises; and (z) the preparation and implementation of any closure plan, remediation plan or other required action in connection with the Premises.

11.6 Owner's Indemnity. Owner shall indemnify, defend, protect and hold Grantee harmless from and against Claims for physical damage to property (including, without limitation, Grantee's roads) and for physical injuries to any person, to the extent caused by the operations or activities of Owner or those acting by, for or under Owner.

12. Grant of Easements.

12.1 Access. In addition to the other Easements granted to Grantee for the Easement Term, Owner grants to Grantee, its licensees, Subtenants, agents, invitees and assigns (a) the right of ingress to and egress from the Windpower Facilities (whether located on the Premises, on adjacent property or elsewhere) over and across the Premises during the Easement Term by means of all existing roads and lanes, or otherwise by such route or routes as Grantee may construct from time to time and (b) the right to construct, maintain, repair, replace, and operate underground Transmission Facilities within Access Strips (all of such rights described in (a) and (b) being referred to herein as the "**Access Easement**"). The Access Easement shall include the right to improve existing roads and lanes, shall run with the Premises, and shall inure to the benefit of and be binding upon Owner and Grantee and their respective transferees, successors and assigns, and all persons claiming under them. If this Agreement expires or terminates after Grantee has installed one or more Turbines on the Premises as part of a commercial utility-scale electrical generating facility, and if Grantee elects to make perpetual the Access Easement, then Grantee shall pay to Owner an amount equal to, at Grantee's option, either the fair market value or the fair market rental of Grantee's use or intended use of the specific portion of the Premises on which such roads, lanes or other routes to be used by Grantee are located or are to be located; provided that the Access Easement shall be limited in scope to only such use of the existing roads as Grantee reasonably requires to access Windpower Facilities located on property other than the Premises. Fair market value or rental shall be an amount agreed upon by Owner and Grantee or, if the parties are unable to agree, determined by an impartial appraiser agreed upon by both parties who is experienced in real estate transactions in the state and who is a member of a national appraisal organization. If the parties are unable to agree on an appraiser, then an appraiser meeting the qualifications set forth above shall be chosen by the senior judge of the state district court for the judicial district in which the Premises are located. The term of the Access Easement shall be coterminous with the Term hereof, and shall expire or terminate contemporaneously herewith. Grantee (and any Assignee) shall have the right, without need for Owner's consent, to assign or convey all or any portion of the Access Easement to an Assignee on an exclusive or nonexclusive basis. The Access Easement shall run with the Premises and inure to the benefit of and be binding upon Owner and Grantee and their respective transferees, successors and assigns, and all persons claiming under them.

12.2 Construction Easements. Owner hereby grants to Grantee, its licensees, Subtenants, agents, invitees and assigns the right to use any portion of the Premises (other than portions of the Premises upon which structures and improvements are located as of the date of this Agreement) during the Easement Term for purposes of construction of the Project, including

Owner to Grantee against all amounts next coming due from Grantee to Owner; and/or (c) to terminate this Agreement upon thirty (30) days' written notice to Owner, without waiving Grantee's rights to damages for Owner's failure to perform its obligations hereunder.

18. Condemnation.

18.1 Complete or Partial Taking. If, at any time during the Term of this Agreement, a Taking occurs, then Grantee shall be entitled to an award of damages for the value of and damages to any of its property interests, including, but not limited to, its interest in the Premises, any Windpower Facility taken or otherwise damaged by the Taking, Grantee's other improvements to the Premises, Grantee's fixtures and personal property taken or otherwise damaged by the Taking, and Grantee's going-concern value taken, destroyed, damaged, or depreciated in value by reason of the Taking. Any termination by Grantee following a Taking (or the granting of a deed or other conveyance in lieu of a Taking) shall not in any way affect or diminish Grantee's rights under to the terms of this Agreement to receive damages for a Taking as provided in this Section nor Grantee's right to receive relocation benefits as provided in Section 18.2.

18.2 Relocation Benefits. In the event of any Taking, Grantee shall be entitled to receive all relocation benefits as provided by law due to any total or partial displacement of the Windpower Facilities or any portion thereof caused by such Taking of the relevant portion of the Premises, Grantee's interest therein, or the Windpower Facilities, including but not limited to, Grantee's improvements, fixtures, and personal property.

18.3 Abatement of Consideration.

(a) In the event of a Taking (or of the granting of a deed or other conveyance in lieu of a Taking) of all or substantially all of the Premises, the Grantee's interest therein, or the Windpower Facilities, Grantee's obligations to pay Consideration under this Agreement shall cease, but the Agreement shall not terminate. Grantee's obligations to pay Consideration shall cease as of the date that is the earliest of (a) the date of the condemnation judgment, (b) the date that the condemning authority takes physical possession of the Premises or Windpower Facilities that are the subject of the Taking, or (c) the date that Grantee, in its sole judgment, is no longer able or permitted to operate the Windpower Facilities on the Premises in a commercially viable manner. Grantee shall continue to pay all amounts payable hereunder to Owner until the earliest of such dates.

(b) In the event of a Taking (or of the granting of a deed or other conveyance in lieu of a Taking) of less than all or substantially all of the Premises or the Windpower Facilities so that Grantee, in its sole judgment, is able to continue to operate the Windpower Facilities located on the Premises in a commercially viable manner, the Consideration for the portion of the Premises and Windpower Facilities remaining thereafter shall be adjusted equitably, and Grantee shall continue to pay such equitably-adjusted Consideration for the remainder of the Term.

19. Miscellaneous.

19.1 Exclusivity. Grantee shall have the exclusive right to develop and use the Premises for wind energy purposes and to convert all of the wind resources of the Premises

during the term of this Agreement; provided, however, that nothing expressly or impliedly contained in this Agreement or represented to Owner shall be construed as requiring Grantee to (a) undertake construction, installation or operation of any Wind Power Facilities on the Premises or elsewhere, (b) continue operation of any Wind Power Facilities from time to time located on the Premises or elsewhere or (c) generate or sell any minimum or maximized amount of electrical energy from the Premises; and the decision if, when and to what extent to construct, install or operate Wind Power Facilities, or to generate or sell electrical energy, shall be solely in Grantee's discretion. Owner shall cooperate with Grantee and in connection with its operations, and, upon request by Grantee, shall make available to Grantee for inspection copies of all reports, agreements, surveys, plans and other records of Owner that relate to the wind on or across the Premises or to the feasibility of wind energy development on the Premises.

19.2 Wind Data. Any and all wind resource data collected by or on behalf of Grantee either before or after the Effective Date shall at all times be the sole property of Grantee.

19.3 Force Majeure. If performance of this Agreement or of any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of Force Majeure (as defined below), the affected party, upon giving notice to the other party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference. The affected party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance as soon as such causes are removed.

19.4 Confidentiality. OWNER SHALL MAINTAIN IN THE STRICTEST CONFIDENCE, FOR THE SOLE BENEFIT OF GRANTEE, ALL INFORMATION PERTAINING TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, THE FINANCIAL TERMS OF THIS AGREEMENT. GRANTEE'S SITE DESIGN AND PRODUCT DESIGN, METHODS OF OPERATION, METHODS OF CONSTRUCTION AND POWER PRODUCTION OF THE WINDPOWER FACILITIES OWNER SHALL NOT USE SUCH INFORMATION FOR ITS OWN BENEFIT, PUBLISH OR OTHERWISE DISCLOSE IT TO OTHERS, OR PERMIT ITS USE BY OTHERS. THE PROVISIONS OF THIS SECTION 19.3 SHALL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT.

OWNER'S OBLIGATIONS UNDER THIS SECTION WITH RESPECT TO ANY SUCH CONFIDENTIAL INFORMATION SHALL NOT BE APPLICABLE TO ANY INFORMATION THAT (a) WAS IN THE PUBLIC DOMAIN AT THE TIME IT WAS DISCLOSED BY THE OTHER PARTY; (b) IT ENTERED THE PUBLIC DOMAIN SUBSEQUENT TO THE TIME IT WAS COMMUNICATED THROUGH NO FAULT OF OWNER; (c) IT WAS IN A RECIPIENT'S POSSESSION, FREE OF ANY OBLIGATION OF CONFIDENCE AT THE TIME IT WAS COMMUNICATED TO RECIPIENT; (d) IT WAS RIGHTFULLY COMMUNICATED TO THE RECIPIENT, FREE OF ANY OBLIGATION OF CONFIDENCE SUBSEQUENT TO THE TIME IT WAS COMMUNICATED TO THE RECIPIENT; (e) IS USED IN ANY COURT OR OTHER LEGAL PROCEEDINGS BY OWNER IN CONNECTION WITH GRANTEE'S BREACH OF THIS AGREEMENT OR OTHER CONDUCT FOR WHICH OWNER SEEKS LEGAL REDRESS.

NOTWITHSTANDING ANYTHING TO THE CONTRARY, OWNER AGREES WITH GRANTEE THAT ANY DISCLOSURE OF ANY INFORMATION BY A RELATIVE OR AGENT OF OWNER OR BY ANOTHER OWNER OF LAND WITHIN THE PROJECT SITE

#4

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, remove lines 23 through 24

Page 2, remove lines 1 through 2

Page 2, line 4, after "agreement." insert "When wind farm facilities are being constructed and in place property owners must make accommodations to their business operations to allow the construction and operations of the wind farm facilities."

Page 2, line 16, after "17-04-05" replace "." with ", unless Senate Bill 2245 becomes law in which case this subsection shall be removed."

Page 2, line 18, after "years" replace "." with ", unless the landowner receives the normal lease payments that would have occurred if the turbine has been operating during that time. For purposes of this provision, the term "normal lease payments" shall mean payments at least equal to the periodic payments received by the landowner in the last calendar year that the turbines were in full operation."

Page 2, replace lines 25 through 27 with "2. The owner of the wind generation facility shall carry general liability insurance relating to events occurring on the wind project site. Such insurance shall, at a minimum, meet the following requirements: Such insurance shall include the property owner as an additional insured on the policy. The landowner shall carry general liability insurance relating to events occurring on the wind project site. Such insurance shall, at a minimum meet the following requirements: Such insurance shall include the developer as an additional insured on the policy."

Page 3, remove lines 4 through 7

Renumber Accordingly

Submitted by:

Kathy Aas
XCEL Energy

Curt Jabs
Basin Electric Power Cooperative

John M. Olson
Otter Tail Power Company and NextERA Energy
(701) 222-3485
olsonpc@midconetwork.com

#5

NDARE
North Dakota Alliance for Renewable Energy, Inc.

Testimony on House Bill 1509
ND Senate Natural Resources Committee
Bill Kalanek
North Dakota Alliance for Renewable Energy

Good Morning Chairman Lyson and members of the House Natural Resources committee. My name is Bill Kalanek and I'm here today representing the North Dakota Alliance for Renewable Energy (NDARE).

NDARE comprises representatives from commodity groups, farm organizations, investor-owned utilities, rural electric cooperatives, state agencies, economic development groups, universities, banks, manufacturers, and conservation and environmental organizations. Partnerships among these stakeholders are central to NDARE's approach. Several of NDARE's members also served on North Dakota's EMPOWER Commission.

With the wind industry growing quickly in North Dakota, the state has yet to establish a framework for companies and landowners to operate under that safeguards the rights and needs of both parties. This being the case, North Dakota faces a number of challenges in developing the industry in a manner that maximizes economic benefits, preserves property and commercial rights, and addresses other public concerns. NDARE feels that sustaining landowner and public support for wind energy and projects is essential to developing a healthy wind industry in North Dakota.

When NDARE met to discuss what its priorities would be in 2009 a single goal emerged in our discussions of Wind development. "Protect the wind rights and interests of landowners and the commercial rights of wind energy project developers and owners." In North Dakota oil and gas development, there are policies to ensure a fair deal for landowners who share the resource. Such policies have yet to be put in place for wind. NDARE feels that House Bill 1509 is a sensible first step that would encourage wind developers' participation in a process that

would serve to ensure confidence as North Dakota's landowners enter into long term agreements to develop our country's largest wind resource

The North Dakota Alliance for Renewable Energy respectfully requests that the committee give House Bill 1509 a Do Pass recommendation.

Thank you.

drc

Dakota Resource Council
"Organizing North Dakotans Since 1978"
P.O. Box 1095~~ Dickinson, ND~~ 58602-1095
701-483-2851
www.drcinfo.com

Testimony in support of HB 1509

March 19, 2009
Senate Natural Resources Committee

Senator Lyson and members of the Senate Natural Resources Committee,

Dakota Resource Council supports the Wind Code of Conduct Bill—HB 1509. We think HB 1509 is good legislation to protect individuals from overzealous companies. We think that same should have been done for coal leases.

We hope that there will be amendments addressing some or all of other problems associated with leases.

Here are comments from one of our members regarding a lease he received:

I have Infinity's easement document in front of me – it is 30 pages.

- There is a 2 page memorandum agreement to record at the courthouse, but the rest of the lease is not recorded. Coal companies did that too. This practice may be legal but it lacks the purpose of public notice.

- This easement is entitled "EASEMENT FOR WIND ENERGY DEVELOPMENT". However, the landowner may not get a wind generator or wind payments, he may just get roads and power lines across his land.

- This easement grants rights "in gross" and without limitations. This means they can do anything and they specify "other generating facilities." This could mean a coal power plant. It should be limited to wind generation.

- A separate easement should be negotiated for powerlines. Same with roads. The easement pays $480 for ½ mile of road, one payment for 60 years.

- There is no provision for inflation. This is a 60 year easement. Inflation has averaged 3-5% for the last 60 years. A dollar in 60 years at 4% is worth 9 cents today.

- Developer can increase output of generators. Payments should also increase.

- There should be a minimum payment per year. HB1509 says if no production for 3 years landowner may terminate the easement – that helps but should the landowner sit 3 years with no payment?

- The easement gives rights to developer on all of landowner's land. The easement should be limited to a wind tower corridor ¼ or ½ mile wide, what ever is necessary for wind flow.

- The easement limits amounts paid for crop damages, injury to property, roads, etc. and excludes loss or damages for electrical and radio interference. Developer should pay actual value for damage to crop, guidance systems, property etc.

- Developer should provide landowner with accounting of production.

- The easement mentions condemnation. There should be no eminent domain rights.

- The easement says landowner agrees to enter new easements. – NO.

- The easement says "free and complete use and enjoyment by developer" and the easement says landowner will fully support and cooperate with developer including signing documents, writing letters to government for permits, authorization, entitlement, consent at any administrative, judicial, or legislative level.

  These clauses should be prohibited.

- The easement says at termination developer will restore the land to the extent reasonably practical. This may be doing nothing. The easement

should require removal, restoration, and reclamation at termination to the pre easement condition.

- What if the developer goes bankrupt? Should there be a bond? A restoration fund should be set up when production starts.

Thank you for your consideration of these suggestions.

Mary Mitchell
Dakota Resource Council

(1509)

CHAIRMAN LYSON, MEMBERS OF THE NATURAL RESOURCE COMMITTEE:

This is a supplement to my letter dated March 24, 2009, which was presented to you by the Senate Natural Resources Committee Clerk. While that letter dealt with some legal issues of concern, I want to also make the committee aware of other dynamics governing the relationship between the wind energy developer and the landowner.

CONFIDENTIALITY NON-DISCLOSURE

I am aware that there has been some thought given to limiting "confidentiality" in wind energy contracts to price terms. It needs to be understood by the committee that the option will contain copyrighted intellectual proprietary information regarding turbine layouts, construction drawings, wind data and other information. While I once thought that wind energy was the shared use of a limitless resource and a non-competitive environment, I have since learned that this industry is extremely competitive and becomes more so with the development of more wind farms in North Dakota. Confidential and proprietary information needs to be protected. No protection of the landowner's interest is accomplished by sacrificing the developer's intellectual property rights.

LENDER REQUIREMENTS

The other dynamic that I want to share with the committee is the fact that these wind energy companies who are proposing to finance and install wind farms in North Dakota are borrowing hundreds of millions of dollars from lenders. With the tightening of credit in this country these lenders are more and more insisting that the contracts with landowners contain certain protections for the lenders themselves which are beyond the ability of the wind energy company to negotiate with the landowner. Consequently, there are provisions and restrictions in these contracts which the wind energy company would be willing to negotiate out but for the fact that they are requirements of the lenders.

Colleen Rice testified before the committee at its hearing on March 13th. She raised issues with respect to indemnity clauses. There certainly is nothing wrong with requiring mutuality of indemnity clauses but the exact language should be left up to the negotiating parties. Also, with respect to indemnity/force majeure Ms. Rice would have the committee believe that this only applies to "Acts of God". To the contrary there are many happenings or events that would significantly or adversely affect these contracts beyond natural elements.

We urge your consideration of these issues in deliberating this bill.

March 24, 2009

SENATE NATURAL RESOURCES COMMITTEE

RE: HB-1509

Chairman Lyson and Members of the Senate Natural Resources Committee:

This correspondence is a follow-up to my comments to your committee on March 13, 2009, regarding House Bill 1509. You may recall that this bill was originally proposed in the House as a charge to the Public Service Commission to develop a "Code of Conduct" for wind energy contracts. With the amendments that were placed on the bill in the House it has evolved into something far more problematical. The bill which, though well intentioned, is now seriously flawed and, in my opinion, unconstitutional.

First, HB-1509, as amended, creates serious Constitutional "Equal Protection" issues. The Treatise, American Jurisprudence, states the following with respect to protection against special and local legislation:

> It is a well recognized principal that under the Federal Constitution all persons have the right to be governed by general rules, since equality of rights, privileges and capacities, and not the granting of special privileges, is the aim of the law. Efforts are not infrequently made by interested parties to procure legislation in their own behalf against other classes of the community, but such legislation is not favored by the courts, and will be upheld only when it is strictly within the legitimate power of congress or the state or municipal legislatures. In general, every special or private law which directly proposes to destroy or effect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination is unconstitutional and void.

House Bill 1509 is an attempt to draw special legislation for one class of persons, to -wit: landowners involved with wind energy contracts. The Equal Protection clause of the Constitution forbids a legislative body from selecting any person upon whom it imposes legislation which is not cast upon others similarly situated. For the state legislature to single out wind energy contracts for this type of selective and restrictive treatment which is not made a requirement of (1) oil and gas leases; (2) transmission line easements; (3)

coal leases; or (4) water rights, just to name a few, would be an effort to single out one class of persons to be subject to hostile or discriminatory legislation.

Second, the right of private parties to enter into contracts is also protected by the law, American Jurisprudence states:

> Courts have held that it is a matter of paramount public policy that the freedom to contract not be interfered with lightly and it is the court's duty to sustain the legality of a contract in whole or in part wherever it can do so. Rules which say that a given agreement is void as being against public policy are not to be extended arbitrarily, because if there is one thing which more than another public policy requires it is that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be enforced by courts of justice.

Paragraph 1.a. of the proposed legislation which requires wind easements and wind leases to be "written in **clear and coherent manner** using words with **common and everyday meanings**" is un-enforceably vague and void on its face because the highlighted phrases I have referred to above are not otherwise defined in law. The requirement in Paragraph 1.c that the contract "must be executed **at least five (5) business days** after the easement has been delivered" creates conditions not seen in any other legislation that I am aware of.

The requirement in Paragraph 1.d. that the contract "**may not contain a confidentiality clause keeping the terms of agreement or related negotiations confidential**" is a direct interference with the private right of contract. Simply put, if one of two parties to a contract want its terms confidential the other party would have two choices. Either accept the confidentiality clause or not sign the contract.

The provisions of Paragraphs 1.e, f, g and h are already a matter of basic easement law.

The requirements of Paragraph 1.j with reference to "**five years**" citing NDCC 17-04-03 and 17-04-05 are a bridge to nowhere because the five year limitation requirements in those two sections were removed by SB 2245 and replaced with more sophisticated language.

The provisions of Paragraph 4 requiring payment of attorney's fees by **lessee** to **lessor's** attorney, although an expected windfall to attorneys practicing in this area (and a dangerous invitation to some who shouldn't) creates serious ethical problems for any attorney as to who he represents. I do not think any attorney would be comfortable when faced with this ethical conundrum.

At the hearing held on March 13, 2009, proposed amendments were presented by representatives of Excel Energy, Basin Electric and Otter Tail Power Company. These amendments, though still an arguably objectionable attempt to dictate the terms of contract between private parties, do offer an environment where wind energy companies could find common ground not only with the legislature but with prospective landowners.

This committee is fortunate to have three accomplished attorneys, all of whom enjoy great respect in the legal profession. I am sure that they will agree with me that if a legislative body enacts laws that interfere with the right of private parties to contract, it will be subject to stiff legal challenges and a slippery slope indeed. On behalf of my client, Renewable Energy Systems I ask that this bill be given a DO NOT PASS recommendation unless it contains the amendments presented to you at the hearing on March 13th.

Respectfully submitted,

William J. Brudvik
OHNSTAD TWICHELL LAW OFFICES
12 Southeast Third
P. O. Box 547
Mayville, North Dakota 58257
(701) 788-3251
North Dakota ID No. 03290

\\Annette\shireen\Renewable Energy Systems\Ltr to Committee.wpd

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

(American Wind Energy Association Coalition)

We believe the following are areas of agreement among stakeholders:

Page 1, line 3, remove "; and to declare an emergency"

Page 1, remove lines 21 and 22, insert "b. May not be executed by the parties until at least ten business days after the first proposed easement or lease has been delivered to the property owner."

Page 2, remove lines 16 through 18.

Page 3, line 9 after "or" remove "offer the relief as is requested by the property owner" and insert "such other relief as is allowed by law."

Page 3, remove lines 12 through 14.

Page 3, remove line 15.

Following are remaining amendments proposed by the wind community:

Page 1, remove lines 23 through 24 and insert: "Confidentiality":

1. "The property owner and developer may execute a mutually agreed-to non-disclosure agreement.
2. A non-disclosure agreement may list third parties with whom the terms of the lease agreement may be shared; as a condition of disclosure may require third parties to execute the same non-disclosure agreement; and may limit the period of non-disclosure".

Page 2, remove lines 29 through 31 (indemnification) and insert, "Must contain an obligation upon the developer to indemnify and hold harmless the property owner for claims arising out of the developers use of the property owner's property.

Page 3, line 2 after "site" insert "and may"

Page 3, line 2 remove "At minimum",

Page 3, line 3, remove "the insurance must"

Page 3, line 4, after "policy" insert, "The property owner shall carry general liability insurance relating to property damage and bodily injury occurring on the property owner's property."

Page 2, line 12, after "parties" insert "However, the property owner shall be held responsible for damages caused by its own actions or those of third parties whose actions it controls, such as its employees or tenants of its property other than operator" the developer".

Page 2, line 15, after "violation" insert "of such laws and regulations by the developer, owner or operator."

Page 2, line 21, after "normal" insert "minimum";

Page 2, line 22, remove "turbine" and insert "wind generating facility"

Page 2, line 23 after "normal" insert "minimum"

Page 2, line 23 after "means" insert (i) if the lease or easement provides for a "base amount" or "minimum payment" or similar terms, then such payment, or (ii) if the lease or easement does not provide for a "base amount" or "minimum payment", then

Page 3 line 5, after "lease" insert "entered into after the effective date of this legislation"

Page 3, lines 6 and 7 remove ~~or the owner of the facility does not carry property insurance as required under subsection 2 as determined by a court as a matter of law~~

Page 3, line 9, remove "The"

Page 3, remove lines 10 and 11, or:

Page 3, line 10, remove "property owner" and insert "prevailing party"

Page 3, line 11, remove "by the property owner" and insert "brought"

Renumber Accordingly

90881.0210
Title.

Prepared by the Legislative Council staff for
Senator Erbele
April 27, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

That the Senate recede from its amendments as printed on pages 1219 and 1220 of the House Journal and pages 1014 and 1015 of the Senate Journal and that Engrossed House Bill No. 1509 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of wind easements and wind energy leases.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - WIND EASEMENTS AND WIND ENERGY LEASES. During the 2009-10 interim, the legislative council shall consider studying wind easements and wind energy leases. The study must include consideration of confidentiality clauses, the liability of each party for damages and taxes, instrument provisions relating to insurance and the need for insurance, and the concerns of property owners and wind developers. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Renumber accordingly

Prepared by the Legislative Council staff for
Representative DeKrey
April 28, 2009

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

That the Senate recede from its amendments as printed on pages 1219 and 1220 of the House Journal and pages 1014 and 1015 of the Senate Journal and that Engrossed House Bill No. 1509 be amended as follows:

Page 1, line 8, remove "Must be written in a clear and coherent manner using words with common"

Page 1, remove lines 9 and 10

Page 1, line 11, remove "b."

Page 1, line 23, replace "c. Must" with "b. May not", after "executed" insert "by the parties until", replace "five" with "ten", and after "the" insert "first proposed"

Page 2, line 1, replace "d." with "c.", replace "contain a" with "require either party to maintain the", replace "clause keeping" with "of any negotiations or", and replace "agreement or" with "any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement"

Page 2, line 2, remove "related negotiations confidential"

Page 2, line 3, replace "e." with "d."

Page 2, line 4, after the underscored period insert "When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility."

Page 2, line 5, replace "f." with "e."

Page 2, line 6, after the second "wind" insert "energy"

Page 2, line 7, replace "g." with "f." and after "wind" insert "energy"

Page 2, line 11, replace "h." with "g."

Page 2, remove lines 14 through 16

Page 2, line 17, replace "j." with "h."

Page 2, line 18, replace "generating" with "energy" and after "years" insert "unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if this language is not provided for in the lease or easement, payments at least equal to the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation"

Page 2, line 19, replace "k." with "i."

Page 2, remove lines 22 through 24

Page 2, line 25, replace "generating" with "energy", replace "property" with "general liability", and replace "on the" with "relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may"

Page 2, line 26, remove "facility and" and replace the second "and" with an underscored period

Page 2, remove line 27

Page 2, line 29, remove "or the owner of the facility does not carry property insurance as"

Page 2, line 30, remove "required under subsection 2 as determined by a court as a matter of law"

Page 3, line 1, replace "offer the relief as is requested by the property owner" with "order any relief allowed by law" and remove "The"

Page 3, remove lines 2 through 7

Renumber accordingly