



ORDINANCE NO. 2011-03

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

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

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

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

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

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

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

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

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

WIND ENERGY CONVERSION SYSTEM (WECS) REQUIREMENTS:

Section 1. AREAS OF REGULATION.

This Ordinance shall govern all lands within the boundaries of the county, including privately owned land or land owned by the United States, excluding any land within the limits of any incorporated municipality, (Section 4-37-2 N.M.S.A. 1978)

Section 2. GENERAL PROVISIONS.

(A) PURPOSE AND INTENT.

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

(B) TITLE.

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

(C) SEVERABILITY.

If any word, phrase, sentence, part, section, subsection, or other portion of this ordinance or any application thereof to any person or circumstance is declared void, unconstitutional or invalid for any reason, then such word, phrase, sentence, part, section, subsection or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this ordinance and all applications thereof, not having been declared void, unconstitutional, or invalid, shall remain in full force and effect. Any WECS Permit issued under this ordinance shall be comprehensive and not severable. If part of a permit is deemed or ruled to be invalid or unenforceable in any material respect by a competent authority, or is overturned by a competent authority, the permit shall be void in total, upon determination by the Board of Commissioners.

Section 3. FINDINGS.

All forms of development, including WECS, have the potential to negatively impact County resources and the environment through the introduction of contaminants and surface disturbance, which can lead to habitat degradation, fragmentation, and loss as well as degraded qualities of air, soil, and water. This ordinance is designed to allow for the responsible development of WECS to effectively utilize the County's wind resources and, significantly contribute to the rural economies of the County, while ensuring the minimum possible impact on the environment and

fulfilling the Board of County Commissioners interest of protecting the health and welfare of County residents.

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

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

Section 4. NO STATE OR FEDERAL PRE-EMPTION.

This Ordinance is supplementary to, and does not replace, the following Federal and State statutes:

- (A) the Surface Owners Protection Act, N.M.S.A. 1978, §§ 70-12-1 et. seq.;
- (B) the Water Quality Act, N.M.S.A. 1978, §§ 74-6-1 et seq.;
- (C) the Solid Waste Act, N.M.S.A. 1978, §§ 74-9-1 et seq.;
- (D) the Rangeland Protection Act, N.M.S.A. 1978, §§ 76-7B-1 et seq.;
- (E) the Emergency Planning and Community Right To Know Act, 42 U.S.C.A. §§ 11001 et seq.;
- (F) the New Mexico Public Health Act, N.M.S.A. 1978 §§ 24-1-1 et seq.;
- (G) the Wildlife Conservation Act, N.M.S.A. 1978, §§ 17-2-37 et seq.;
- (H) the Cultural Properties Act, N.M.S.A. 1978, §§ 18-6-1 et seq.;
- (I) the National Historic Preservation Act, 16 U.S.C.A §§ 470 et seq.;
- (J) the Uniform Trade Secret Act N.M.S.A. 1978, §§ 57-3A-1 et seq.;
- (K) the Prehistoric and Historic Sites Act, N.M.S.A. 1978, §§18-8-1 et seq.;
- (L) the Cultural Properties Protection Act, N.M.S.A. 1978, §§ 18-6A- 1 et seq.;
- (M) the Archaeological Resources Protection Act, 16 U.S.C.A. § 470 aa et seq.; and
- (N) the Energy Policy Act, 42 U.S.C.A. § 6201 et. seq.

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

Section 5. DEFINITIONS.

For purposes of this ordinance, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations and their derivations shall have the meaning given in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number

and words in the singular number include the plural number. The word "shall" is always mandatory, and not merely directory.

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

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

Commercial Wind Turbine shall mean a Wind Energy Conversion System which converts wind energy into electricity through the use of a wind turbine generator, and includes the turbine, blade, tower, base and pad transformer, if any; provided that such a system shall only be a wind turbine for purposes of this Article if it both has a total height greater than 75 feet and nameplate capacity of greater than 100 kW.

Construction means any clearing of land, excavation, or other action that would adversely affect the natural environment of the project site or transportation and access route but does not include changes needed for temporary use of sites or routes for non- utility purposes, or uses in securing survey or geological data, including necessary borings to ascertain foundation conditions.

County shall mean the County of Lincoln.

FAA shall mean the Federal Aviation Administration.

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

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

Permittees means one to whom a permission or permit is given. Both landowners and developer/contractors are considered the same for this definition.

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

Private Wind Turbine shall apply to private facilities with a single tower, and a height of less than seventy-five (75) feet. Private towers are used primarily for on-site consumption of power.

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

WECS Site Permit is a permit issued upon compliance with standards of this Article.

WECS Site Plan Review is the process used to review a proposed WECS.

Section 6. MITIGATION MEASURES.

(A) **Site Clearance.** The permittees shall disturb or clear the site only to the extent necessary to assure suitable access for construction, safe operation and maintenance of the WECS.

(B) **Topsoil Protection.** The permittees shall implement measures to protect and segregate topsoil from subsoil in cultivated lands unless otherwise negotiated with the affected landowner.

(C) **Compaction.** The permittees shall implement measures to minimize compaction of all lands during all phases of the project's life and shall confine compaction to as small an area as practicable.

(D) **Livestock Protection.** The permittees shall take precautions to protect livestock during all phases of the project's life.

(E) **Fences.** The permittees shall promptly replace or repair all fences and gates removed or damaged during all phases of the project's life unless otherwise negotiated with the affected landowner.

(F) **Roads.** Prior to commencement of construction, the permittees shall identify all county "haul roads" that will be used for the WECS project and shall notify the county governing body having jurisdiction over the roads to determine if the haul roads identified are acceptable. The governmental body shall be given adequate time to inspect the haul roads prior to use of these haul roads. Where practical, existing roadways shall be used for all activities associated with the WECS. Where practical, all-weather roads shall be used to deliver concrete, turbines, towers, assemble nacelles and all other heavy components to and from the turbine sites.

The permittees shall, prior to the use of approved haul roads, make satisfactory arrangements with the appropriate county governmental body having jurisdiction over approved haul roads for construction of the WECS for the maintenance and repair of the haul roads that will be subject to extra wear and tear due to transportation of equipment and WECS components. The permittees shall notify the County Planning Office of such arrangements.

(a) **Turbine Access Roads.** Construction of turbine access roads shall be minimized. Access roads shall be low profile roads so that equipment can cross them and shall be covered with gravel or similar material approved by the County road Superintendent. When access roads are constructed across streams and drainage ways, the access roads shall be designed in a manner so runoff from the upper portions of the watershed can readily flow to the lower portion of the watershed.

(b) **Private Roads.** The permittees shall promptly repair private roads or lanes damaged when moving equipment or when obtaining access to the site, unless otherwise negotiated with the affected landowner.

(c) **Control of Dust.** The permittees shall utilize all reasonable measures and practices of construction to control dust.

Section 7. SETBACKS.

Wind turbines shall meet the following minimum spacing requirements.

(A) Distance from existing off-site residences, business and public buildings shall be one thousand (1,000) feet. Distance from on-site or lessor's residence shall be one thousand (1,000) feet. Unless waived in writing by the residential or business owner at time of construction.

(B) Distance from right-of-way (ROW) of public roads shall be 500 feet or one point one (1.1) times the height of the wind turbines depending upon which is greater, measured from the ground surface to the tip of the blade when in a fully vertical position.

(C) Distance from any property line shall be 500 feet or one point one (1.1) times the height of the wind turbines depending upon which is greater, measured from the ground surface to the tip of the blade when in a fully vertical position unless wind easement or waiver of setback has been obtained from adjoining property owner.

(D) Distance shall not be closer to any public right of way, than the calculated blade ice throw distance.

Section 8. LINES, INTERFERENCE, LIGHTING, FOOTPRINT.

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

(B) **Lighting.** Towers shall be marked as required by the Federal Aviation Administration (FAA). There shall be no lights on the towers other than what is required by the FAA. This restriction shall not apply to infrared heating devices used to protect the monitoring equipment.

(C) **Footprint Minimization.** The permittees shall design and construct the WECS so as to minimize the amount of land that is impacted by the WECS. Associated facilities in the vicinity of turbines such as electrical/electronic boxes, transformers and monitoring systems shall to the greatest extent feasible be mounted on the foundations used for turbine towers or inside the towers unless otherwise negotiated with the affected landowner.

(D) **Electrical Cables.** The permittees shall place electrical lines, known as collectors, and communication cables located on private property, underground unless such treatment is not commercially reasonable. Lines may be placed above ground when conditions warrant due to subsurface or topographical conditions. Collectors and cables shall also be placed within or immediately adjacent to the land necessary for turbine access roads unless otherwise negotiated with the affected landowner. This paragraph does not apply to feeder lines.

(E) **Feeder Lines.** The permittees may place overhead electric lines, known as feeders, on public rights-of-way if a public right-of-way exists. Changes in routes may be made as long as feeders remain on public rights-of-way and approval has been obtained from the governmental unit responsible for the affected right-of-way. If no public right-of-way exists, the permittees may place feeders on private property. When placing feeders on private property, the permittees shall place the feeder in accordance with the easement negotiated with the affected landowner. The permittees shall submit the site plan and engineering drawings for the feeder lines before commencing construction.

Section 9. DECOMMISSIONING/RESTORATION/ABANDONMENT.

(A) **Decommissioning Plan.** Within 120 days of completion of construction, the permittees shall submit to the County Planning Office a decommissioning plan describing the manner in which the permittees anticipate decommissioning the project in accordance with the requirements of paragraph (b) below.

(B) **Disposition.** The permittee shall submit a plan describing the intended disposition of the WECS at the end of its useful life, and shall describe any agreement with the landowner regarding equipment removal upon termination of the lease. Permittee shall also, prior to the commencement of construction, post a surety bond or other financial security acceptable to the County, in an amount sufficient to fund the decommissioning plan and remove all improvements installed by permittee and restore the land in accordance with this ordinance and any agreements with the landowner(s). The amount of the security instrument shall be conclusively determined at permittees cost by an independent third party mutually acceptable to permittee and the County and familiar with wind generation projects and shall consider, among other things, scrap or reuse

value and inflationary and cost escalation to the date of estimated removal. The value of the security instrument shall be updated on or before every fifth anniversary of the commencement of commercial operation of the WECS. In the event that permittee does not commence and complete the decommissioning plan, including all removal and reclamation of the land, within two years of the cessation of commercial operations or abandonment of the facility, whichever may come first, the proceeds of the security instrument necessary for the completion of the decommissioning plan shall be paid to the County and/or landowner to be used exclusively for the completion of the decommissioning plan, the costs of recovering such funds, and any other cost of the reclamation of the affected lands. Failure to generate electricity in commercial quantities for a period of one year shall be considered to constitute cessation of commercial operations unless the permittee can show good cause for such failure and good faith plans to resume operations within a time acceptable to the County.

(C) **Site Restoration.** Upon expiration of the WECS permit, or upon earlier termination of operation of the WECS, the permittees shall have the obligation to dismantle and remove from the site all towers, turbine generators, transformers, overhead and underground cables, foundations, buildings and ancillary equipment to a depth of two feet below grade. To the extent possible the permittees shall restore and reclaim the site to its pre-project topography and topsoil quality. All access roads shall be removed unless written approval is given by the affected landowner requesting that one or more roads, or portions thereof, be retained. Any agreement approved by the Lincoln County Board of Commissioners for removal to a lesser depth or for no removal at all shall be recorded with the County Clerk's Office and shall show the locations of all such foundations. All such agreements between the permittees and the affected landowner shall be submitted to the County Planning Office prior to completion of restoration activities. The site shall be restored in accordance with the requirements of this condition within eighteen months after expiration of the WECS permit.

(D) **Abandoned WECS.** The permittees shall advise the County Planning Office of any turbines that are abandoned prior to termination of operation of the WECS. Lincoln County may require the permittees to decommission any abandoned WECS as described in (B) above.

Section 10. TOWERS, VISUAL APPEARANCE, LIGHTING, POWER LINES.

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

(A) Wind turbines shall be mounted on industry standard towers, painted an industry standard color. The appearance of turbines, towers and buildings shall be maintained throughout the life of the WECS pursuant to industry standards (i.e., condition of exterior paint, signs, landscaping, etc). A certified registered engineer and authorized factory representative shall certify that the construction and installation of the WECS meets or exceeds the manufacturer's construction and installation standards.

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

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

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

(E) The electrical collection system shall be placed underground within the interior of each parcel at a depth designed to accommodate the existing agricultural land use to the maximum

extent practicable. The collection system may be placed overhead adjacent to County roadways, near substations or points of interconnection to the electric grid or in other areas as necessary. (F) The County may allow the Applicants to include certain accessory type uses on a WECS Project facility property, such as a visitor center where the public may be permitted to view a facility and obtain information about the specific facility and wind farms in general; provided, however, that the specific form of any such accessory use shall be determined in the sole discretion of the permittee. Directional signage may be permitted by the County in its reasonable discretion. Information on local historical issues may be included, or required, upon County approval of such accessory uses.

Section 11. SOUND.

Sound level shall not exceed 55 dBs, including constructive interference effects at existing off-site residences, businesses, and public buildings.

Section 12. SAFETY.

- (A) All collection system wiring shall comply with all applicable safety and stray voltage standards.
- (B) Wind Turbine towers shall not be climbable on the exterior.
- (C) All access doors to wind turbine towers and electrical equipment shall be locked.
- (D) Appropriate warning signs with 24 hour emergency contact information shall be placed on wind turbine towers, electrical equipment, and WECS entrances.
- (E) Height from Ground Surface. The minimum height of blade tips, measured from ground surface when a blade is in fully vertical position, shall be twenty-five (25) feet.
- (F) The Applicants, Owners or Operators shall submit to the local fire department and/or the Emergency Management Coordinator a copy of the site plan.
- (G) Upon request by the local fire department and/or the Emergency Management Coordinator, the Owners or Operators shall cooperate with the relevant agency to develop any emergency response plan.
- (H) Nothing in this section shall alleviate the need to comply with any and all other applicable fire laws and regulations.

Section 13. PERMIT EXPIRATION

The WECS permit shall become void if no substantial construction has been completed within three (3) years of issuance. The Board of County Commissioners may grant an extension to the original permit of an additional three (3) years, upon written request from the permittee.

Section 14. VARIANCES.

Where, in the case of a particular proposed application, it can be shown that strict compliance with the requirements of this ordinance would result in a substantial or unreasonable hardship to the permittee because of exceptional topographic, soil or other surface or subsurface conditions, or that strict compliance with this ordinance would result in inhibiting the achievement of the objectives of this ordinance, the Board of County Commissioners may recommend modification or waiver of the standards. No variance shall be granted simply because the permittee disagrees with or does not wish to meet the goals and objectives of this ordinance. In no case shall a variance be granted which will cause the County to absorb any costs over and above those typically associated with a WECS Permit approval. Also, no variance shall be granted contrary to the mandatory requirements of State law. Requests for variances must be submitted in writing.

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

Section 15. FAILURE TO ACT.

If Lincoln County does not act upon a WECS Permit application within forty five (45) days of submittal to the Planning Department, the permittee shall give the Board of County Commissioners written notice of its failure to act. If the Board of County Commissioners fails to approve or reject the application within thirty (30) days after that notice, the Board of County Commissioners shall, upon demand by the permittee, issue a statement stating that the WECS permit has been approved.

Section 16. PERMIT PROCEDURES.

An application for a permit must be submitted to the Lincoln County Planning Department on the form prescribed by the Department. An application for approval of a WECS project must include text and maps sufficient to show that the proposed facility would comply with the required standards in Section 17 below.

No work, except for wind monitoring, soil testing and other survey work, may commence to construct a wind energy facility until a County WECS permit has been issued by the County Planning Department. Fees for the permit will be \$1,000 plus \$250 for each proposed wind turbine up to a total amount of no more than \$10,000.

Section 17. REQUIRED INFORMATION FOR PERMIT APPLICATION.

- (A) Boundaries of the site proposed for the WECS Permit and associated facilities on United States Geological Survey Map or other map as appropriate.
- (B) Map of occupied residential structures, businesses and public buildings on site, and within 1000 feet of the site boundaries.
- (C) Site plan showing the general layout of the WECS, access roads and utility lines, and showing the required setbacks from property lines, existing structures and public street rights of way.
- (D) Location of other WECS Permits issued in the general area.
- (E) A schedule for the proposed start and completion dates of construction of the WECS.
- (F) Copies of registered letters notifying locally affected Military Installations (White Sands Missile Range; Holloman, Kirtland, and Cannon Air Force Bases) that a WECS permit has been applied for with Lincoln County.
- (G) A copy of written notification to the Federal Aviation Administration.
- (H) The Owner or Operator of the WECS Project shall maintain a current general liability policy covering bodily injury and property damage with limits of at least \$1 million per occurrence and \$2 million in the aggregate. The Applicant shall provide proof of insurance to the Board of County Commissioners prior to the Board's approval of the submitted application or within thirty (30) days following approval of the WECS permit. If the WECS permit is approved, the permittee of the WECS shall provide proof of insurance to the Lincoln County Planning Office annually.
- (I) A copy of signed engineered plans for the foundation(s) and tower(s).
- (J) Copies of building permits as issued.

Section 18. PENALTIES.

Any person who violates any of the provisions of this Ordinance shall be punished by a fine of up to three hundred dollars (\$300) and/or imprisonment of no more than ninety (90) days, or both. Each day this Ordinance is violated shall be considered a separate offense.

PASSED, APPROVED, and ADOPTED this 15th day of Feb, 2011.

**BOARD OF COUNTY COMMISSIONERS
OF LINCOLN COUNTY, NEW MEXICO**

Eileen M. Sedillo
Eileen Sedillo, Chairwoman

Jackie Powell
Jackie Powell, Vice Chair

Absent
Tom Battin, Member

Mark Doth
Mark Doth, Member

Kathryn L. Minter
Kathryn Minter, Member



Attest:

Rhonda Burrows
Rhonda Burrows, Lincoln County Clerk