

Project Name Linn County Solar Policy Plan Review Group Assist **Date** 3/6/23
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Regarding Research for Lifecycle Cost Committee

1) General financial assurance questions:

a. What types of financial assurance should Linn County accept from developers? For instance, letters of credit, insurance, bonds, etc.

Many forms of financial assurance ("FA") may be used. Some examples are trust funds, cash escrows, letters of credit, surety bonds, insurance, corporate self-insurance (for entities with large and stable net worth), and promissory letter or parent guarantee (if stable parent company). All forms have their advantages and disadvantages. We commonly see letters of credit or bonds required.

b. What are different ways to assure that the full decommissioning funds will be available at the end of the project, factoring in other considerations like inflation?

We recommend requiring a re-evaluation of the decommissioning costs on a regular basis, such as every 5 years during the facility life, commencing with the date the initial FA is required. Some states/counties require a licensed engineer in the state to evaluate the decommissioning costs every few years to determine whether the FA should be increased to adequately cover the decommissioning costs if the developer fails to decommission the project. Some counties/states also add an "administrative" factor to account for estimated administrative costs if the owner was to default on its decommissioning obligations.

c. Should the amount of the financial assurance be incremental (i.e. How much by when)?

Incremental FA can be a benefit to smaller solar developers with less access to credit than a public utility. However, this also requires additional administrative activities and costs to track the payment due dates and to ensure the additional FA is, in fact, obtained. Depending on the county's preference (if it decides to use incremental payments of FA), the county could make the payments constant or variable in regular intervals. An example would be requiring 4% of the estimated FA to be provided each year starting with the commencement of construction until year 14 or 15, and then the remaining FA posted incrementally by year 30. Other counties/states require a percentage (for example, 33%) of the FA to be provided at commencement of construction, then, similar installments paid in 5 years and 10 years thereafter. In the ordinances we have reviewed in the Midwest, it appears that incremental FA is not common. A more common approach is requiring the entire FA to be obtained 1/3 or 1/2 way through the anticipated project life or lease/easement term, then re-evaluated each 5 years to see if additional FA must be obtained. Development may be deterred if the developer has to provide the entire FA up-front or in the first few years of operation, as the developer typically will have financing costs to pay during the first few years of operation. (For example, for wind projects, typically the projects may be paid off and the developer receiving income after 12-15 years, so sometimes that's when FA is required to be provided)

d. Could there actually be a decommissioning fund similar to what the NRC requires of nuclear plants?

“Pooled funds” or “bond pools” are a type of financial instrument aggregates contributions from project owners of a category of facilities conducting highly regulated activities, such as nuclear power plants, hazardous waste treatment facilities, or oil wells. According to a 2018 solar decommissioning workgroup discussion in the Minnesota Commerce Department, states have generally discussed but foregone pooled funds as financial assurance instruments for solar and wind projects due to the complexity of their administration.

e. What happens to the bond if the utility company completes decommissioning in accordance with Linn County standards as outlined by the approved decommissioning plans of the projects?

The FA (or any unused part of the FA) is typically released if the project owner completes its decommissioning obligations. For example, if the FA is a surety bond, it would be terminated upon the project owner’s completion of the decommissioning obligations.

f. If decommissioning costs are re-evaluated every 5 years, in what manners can the bonds be modified? For instance: If a \$1,000,000 financial assurance is required at year 10, and increases \$500,000 every 5 years, would the original bond be modified or would additional financial assurance be required?

This should be a factor used in considering which types of FA should be allowed under the ordinance, as the FA likely will have to increase upon each re-evaluation. Surety bonds typically can be modified through a rider – and an underwriting process generally is required.

2. Landowner rights:

a. Would landowners who participated in the project have access to the financial assurance funds? What does this process look like?

Typically, the FA would be accessible only to the county – not the fee title holder of the land upon which the facility is located - if the project owner did not fulfill its decommissioning obligations. The county would then use the funds to have the decommissioning work performed. If the county turned over the funds to the landowners, what would ensure the landowners would have the decommissioning work performed and not just use the funds for other purposes?

b. Since recovery from a disaster event might be considered separately from decommissioning, what kind of insurance or documentation should be required to assure that those affected by debris are made whole.

Solar leases/easements usually have language requiring the project owner to maintain certain levels of insurance to protect the fee titleholders of the land upon which the project is located. Normally, debris falling onto another’s property due to a natural disaster would be covered by the insurance of the property owner upon which the debris falls. The county should ask its insurer to provide guidance on whether there is a type of insurance that could cover these costs, and then require the project owner to provide evidence of such coverage in the recommended amounts during the permitting process and require this insurance to be kept in force during the facility’s life.

3. County liability:

- a. In the event of project abandonment, what would be the process and the cost to the County (financial and perhaps otherwise) in accessing the funds for decommissioning the project. What sort of timeframe could that be (weeks, months, years)?**

First, the county should consider adding language to its ordinance requiring the project owner to give the county notice of the project termination, expiration, or abandonment at least 60 days prior to the termination, expiration, or abandonment. Consider either adding language to the ordinance or requiring language in the decommissioning plan/agreement stating the county is required to make reasonable efforts to contact the project owner prior to drawing on any FA, but that any failure of notice does not invalidate any action of the county. Letters of credit are typically easier to draw upon than surety bonds, which is a more-involved process. This is because a letter of credit is independent from the contract, which means no contract default must be shown before the county would draw on it. The obligation to perform under a surety bond doesn't occur until the contractual obligation is breached. To counter this difference, the surety bond could be drafted to state no default under the decommissioning agreement needs to be proved, but the payment under the surety bond must be made upon notice of default or a draw request. The surety bond also could include language stating the project owner agrees to waive any legal defenses. The county could also require a decommissioning agreement in addition to the decommissioning plan, which agreement would be entered into by the county and the project developer/owner. I have attached an example of a decommissioning agreement from a Plymouth County, Iowa wind project.

4. Bond transfer mechanisms and considerations:

- a. If the project is sold to a different owner, what are some mechanisms by which the performance bond (or other financial assurance mechanisms) will be moved/transferred? (that is, from owner to owner)**

The decommissioning agreement between the project owner and county should include language stating the project owner cannot assign its obligations under the decommissioning agreement unless (i) the county agrees and (ii) the assignee agrees to assume all obligations of the project owner under the decommissioning agreement.

5. Specific legal wording examples:

- a. Is there particular legal wording required for Linn County or a landowner to access the funds if the LLC project owner or any contractor hired by the project owner does not decommission the project or does not complete the decommissioning? If so, is this wording necessary in the bond itself and/or Linn County ordinance?**

See 3b above. As stated above, the fee title owner of the property usually is not allowed to draw on the FA, only the county may draw on the FA. The ordinance/decommissioning agreement should also include language if the project owner defaults in its decommissioning obligations, the county has the right to enter the facility without further need of consent of the project owner to engage in decommissioning.

- b. Is there particular legal wording that would be required in the bond and/or in county ordinance that would allow the county to keep excess funds (if any) if the LLC owner does not decommission the project?**

Usually, ordinances and decommissioning agreements provide that the county may only draw the funds necessary to complete the decommissioning obligations. The remainder of the FA, if any, is then returned to the project owner.

- c. If the decommissioning cost overruns projections and the amount of the bond, what legal wording would be required in the bond and/or county ordinance to ensure that the LLC project owner completes the decommissioning at no cost to Linn County or the landowners?**

The ordinance and/or decommissioning agreement should include language stating if the FA is insufficient to fund the decommissioning, the project owner agrees to immediately pay for any decommissioning expenses in excess of the FA. The ordinance and/or decommissioning agreement should also include language stating if the FA is insufficient to pay for the decommissioning, and the project owner fails to pay for the decommissioning expenses in excess of the FA, the county is granted a license to enter onto the solar farm and remove all improvements, and allowing the county to keep the portion of the salvage value necessary to fund the decommissioning expenses in excess of the FA. Usually, the remainder of the salvage value is paid to the project owner.

- d. Is there any particular legal wording or a certain procedure required regarding bonds due to the project being on many different parcels of land with leases with many different landowners? Similarly, is anything required to be done when a landowner transfers property (upon death to other family members, for example)?**

As the FA would be paid to the county if the project owner fails to properly decommission the project, and not paid to any individual landowner, nothing should be required upon the fee title holder's transfer of the property subject to the solar lease or easement.

- e. What legal wording should the County use to define abandonment in either County ordinance or the form of financial assurance accepted?**

Some state/county ordinances state if the project isn't producing electricity for a year, the project is "abandoned". We do not recommend that, as some solar farms are back-up facilities, producing energy only on days with high electrical demands. Just because a facility isn't presently producing electricity, doesn't mean it isn't being used as a backup facility. Abandonment can be defined in the ordinance, decommissioning agreement, and or the FA document. Abandonment could be defined as occurring (i) upon termination or expiration of the solar farm leases/easements or (ii) after one year without production, storage of energy, or use as a backup facility. Exceptions could be made for (i) a force majeure event that has occurred or is occurring, which will prevent the facility from resuming operation within 12 months, (ii) if the facility is in the process of being repowered, (iii) project pending completion of construction of the facility due to a backlog of cases or service requests in the MISO queue, (iv) a situation in which the project owner can provide evidence to the county board of supervisors, that the facility's period of continuous inactivity is due to circumstances beyond the project owner's control and that the facility has not been abandoned, or (v) appeal of the notice of abandonment from the county within a set time of the project owner's receipt of the notice in which the project owner explains the reasons for operational difficulty and provides a timeframe for corrective action that the county deems reasonable.

SAMPLE

DECOMMISSIONING AGREEMENT

THIS DECOMMISSIONING AGREEMENT (“Agreement”) is made this _____ day of _____, 2020, between Plymouth Wind Energy, LLC (“PWE”), a Delaware limited liability company with an address at One South Wacker Drive, Suite 1800, Chicago, Illinois 60606 and Plymouth County, Iowa (“County”). PWE and the County are sometimes referred to herein individually as a “Party” and collectively as the “Parties”.

WHEREAS, PWE is developing a wind energy project (“Project”) in Plymouth County that will consist of wind turbines with an aggregate nameplate capacity of approximately 200 megawatts as well as a substation, other associated equipment, and collection lines (“Project Facilities”); and

WHEREAS, Plymouth County requires that each wind energy device shall have a decommissioning plan outlining the anticipated means and proposed financing methods adequate to remove such structures if their use is discontinued. This decommissioning agreement is intended to set forth the rights and obligations of the owner/developer with respect to the management and potential removal of the project as well as the rights and remedies of the County if the owner/developer fails to abide by this agreement. This agreement shall bind PWE or its successor or assigns. Further, they are required to negotiate and enter into with the County separate agreements for road use and obtain any building permits, zoning approval, and/or conditional use permits required by the County prior to the erection of any wind turbines.

NOW, THEREFORE, in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. As further set forth in greater detail below, PWE shall complete decommissioning of Project Facilities and restoration upon the discontinuance or abandonment of the Project or a portion of the Project. PWE shall provide notice to the County as set forth herein sixty (60) days prior to commencing any decommissioning. The County may require a road use agreement with financial assurances for roads and bridges during decommissioning.
2. The failure by PWE to comply with any zoning requirements, conditions or restrictions imposed on a building permit, or the failure by PWE to comply with the road use agreement shall be deemed a violation of the Plymouth County Wind Energy Ordinance and this agreement.
3. If the Project or any portion of the Project ceases to operate for twelve (12) consecutive months, then the Project or that portion of the Project shall be considered “Abandoned”.
4. A breach of this agreement or any wind turbines that are out-of-service for a continuous one (1) year period will be deemed to have been abandoned and discontinued for use. A breach of this agreement or the road use agreement will be deemed abandonment for purposes of PWE’s duties herein. At such time one or more wind turbines are abandoned, PWE shall remove the wind turbine and engage in a restoration process of the real estate the structure was located upon. If the owner fails to remove the wind turbines, the County

may pursue legal action against the owner of such wind turbines and/or proceed with remedies further set forth in this agreement.

5. As part of the restoration process, PWE hereby agrees to completely remove all Project Facilities added to or installed upon real estate in the County, including (but not limited to) all rotors, nacelles and towers; all collection step-up transformers; all overhead transmission and collection structures; and access roads (unless the relevant landowner requests that such access road remain). PWE shall also completely remove all wind turbine foundations, pads, underground electrical wires and any and all other underground wind energy structures and improvements to a minimum depth of approximately four (4) feet below the surface of the ground. After such removal activities are complete, any affected areas will be regraded and topsoil will be restored and seeded with vegetative cover.
6. This Agreement shall inure to the benefit of and shall be binding upon the Parties hereto, their respective successors, (by merger, consolidation, or otherwise), assignees, legal representatives, lessees, and all other persons or entities acquiring all or any portion of the project, any lot, parcel or any portion thereof within the project, or any interest therein, whether by sale, operation of law, devise, or in any manner whatsoever. PWE shall be responsible to make certain all of its contractors, subcontractors, agents, employees, and representatives comply with all terms of this Agreement.
 - A. Assignment Requiring Consent. This Agreement may not be assigned without the written consent of the other Party and such consent shall not be unreasonably withheld or delayed.
 - B. Permitted Assignment. Notwithstanding subparagraph (i) above, PWE shall be entitled to assign this Agreement, in whole or in part, without the prior written consent of the County to (A) any affiliate of PWE or (B) any person or entity providing financing to PWE or any such affiliate or any collateral agent or security trustee acting on behalf of any such person or (C) to a public utility regulated by the Iowa Utilities Board (each a "Permitted Assignment"). Any such assignment that is a collateral assignment for financing purposes will not relieve PWE of its obligations under this Agreement. In the event of a Permitted Assignment, PWE shall, 30 days prior to such assignment, provide written notice to the County of the name, address, entity type and state of incorporation of the assignee, as well as the name and address of the assignee's registered agent in the State of Iowa.
7. In the case of default by PWE under this Agreement or if the Project or portion of the Project has been Abandoned, the County and its agents shall have access to the Project, pursuant to reasonable prior written notice to PWE, to affect or complete the removal and restoration process for the Project or that portion of the Project that has been Abandoned. Nothing in this Agreement shall be construed to impose upon the County the duty to affect or complete the removal and restoration process contemplated by this Agreement on behalf of any landowner, person or entity.
8. Attached hereto as Exhibit A is PWE's Decommissioning Plan prepared by a registered professional engineer which includes a summary of the estimated cost (net salvage value)

for decommissioning the Plymouth Wind Energy Project. PWE shall provide Financial Assurance to Plymouth County in the amount of twenty-five thousand dollars (\$25,000.00) per each turbine and seventy-five thousand dollars (\$75,000.00) for each electrical substation included in the project owned by PWE as of the **date that the first turbine begins generating electricity**. If the Decommissioning Plan provided indicates an amount greater than twenty-five thousand dollars (\$25,000.00) per each turbine and/or greater than seventy-five thousand (\$75,000.00) for each electrical substation, then the financial assurance shall be increased to the amount indicated in said Decommissioning Plan.

- A. The Decommissioning Plan shall be updated every five (5) years from the date the first wind turbine begins generating electricity onto the transmission grid until the fifteenth (15th) anniversary of the date the first wind turbine began generating electricity onto the transmission grid. A copy of the updated Decommissioning Plan shall be promptly provided to the County.
 - B. The Decommissioning Plan shall be updated annually after the fifteenth (15th) anniversary of the date the first wind turbine began generating electricity onto the transmission grid and the financial assurances shall be adjusted according to the updated decommissioning plan but to a minimum of thirty-five thousand dollars (\$35,000.00) per each wind turbine and one hundred thousand dollars (\$100,000.00) per each electrical substation.
 - C. A copy of the Decommissioning Plan or updated Decommissioning Plan shall be promptly provided to the County. The County may object to the Plan and shall provide notice of any such objection to PWE. In the event of the objection, a separate registered professional engineer agreed to by the parties shall prepare another Decommissioning Plan and cost estimate. The costs of the additional engineering plan and cost estimate shall be born equally by the parties.
 - D. If the cost of the restoration of the project exceeds salvage value and the financial assurance amount, PWE shall be responsible for any difference.
 - E. If any financial security required hereunder either lapses or PWE otherwise fails to post the same, PWE shall be obligated to do so within twenty (20) days of written notice from Plymouth County to do the same or otherwise shall be considered in default hereunder.
 - F. Such financial security shall be released after project has been decommissioned or removed and a certificate of completion has been provided by the County.
9. PWE hereby makes the following financial assurances to the County:
- A. Financial Assurance may be in the form of cash deposited with the County, a performance bond, surety bond, letter of credit or corporate guarantee, as long as the form of Financial Assurance is mutually agreeable between the County and PWE and

security is equal to or greater than the net amount set forth in the Decommissioning Plan or provided for by this agreement.

- B. Such Financial Assurance shall be adjusted corresponding to the Decommissioning Plan updates and the minimum amounts provided for in this agreement.
 - C. If the cost of the restoration of the Project exceeds the salvage value and financial assurance amounts, the PWE shall be responsible for any difference.
 - D. If any Financial Assurance required hereunder either lapses or PWE otherwise fails to post the same, PWE shall be obligated to do so within twenty (20) days of written notice from the County to do the same or otherwise shall be considered in default hereunder.
 - E. Such Financial Assurance shall be released after the Project has been decommissioned or removed and a certificate of completion has been provided and accepted by the County.
10. This Agreement shall be governed by and be construed in accordance with the laws of the State of Iowa. Nothing in this Agreement shall, in any way, limit the legal remedies that the County may pursue against PWE or its successors or assignees in the event of a breach of this Agreement or a failure to fully reimburse and compensate the County for any costs it incurs to restore any real estate affected by the Project. Any dispute arising under this agreement shall be commenced and adjudicated in the Iowa District Court for Plymouth County.
11. Notices.
- A. Any notice, demand, or other communication (“Notice”) given under this Agreement shall be in writing and given personally or by registered or certified mail (return receipt requested) or by overnight mail by a national carrier such as FedEx or UPS. A courtesy copy of the Notice may be sent by facsimile transmission or email transmittal.
 - B. Notices shall be given to the Parties at their addresses set forth below:

Plymouth County Board of Supervisors
215 4th Ave SE
Le Mars, Iowa, 51031

Plymouth Wind Energy
One South Wacker Drive, Suite 1800
Chicago, Illinois 60606
 - C. By Notice to the other Party, any Party may at any time designate a different address or person to which Notice, demand, or other communication under this Agreement shall be given.

D. Unless otherwise provided in this Agreement, Notice by hand delivery shall be effective upon receipt.

12. Default and Remedies.

A. Notice. Unless otherwise provided for in this Agreement, if PWE fails to perform one or more of its material obligations under this Agreement, the County shall provide PWE formal notice of the default and PWE shall have thirty (30) days to cure the default. Notice by the County shall be sufficient if personally delivered or sent by registered or certified U.S. mail or by overnight mail by a national carrier such as FedEx or UPS to the name and address provided for in this Agreement.

B. Remedies. If PWE fails in any way to perform or observe any material covenant, condition, or obligation contained in this Agreement and such failure continues for a period of twenty (20) days after PWE is notified by the County of such failure; or if PWE voluntarily commences bankruptcy, insolvency, reorganization, stay, moratorium, or similar debtor-relief proceedings; or if insolvency, receivership, reorganization, bankruptcy, or a similar proceeding has been commenced against PWE and such proceeding remains undismissed or unstayed for a period of ninety (90) days, PWE agrees that the County may do any, all, or any combination of the following:

1. Halt any and all operation of the wind turbines, substation, or other related infrastructure.
2. Immediately suspend PWE's authority under this Agreement.
3. Complete any work to be done under this Agreement. The County shall invoice PWE for the reasonable cost of such work and PWE shall pay such invoice within thirty (30) days of receipt of such invoice.
4. Seek injunctive relief.
5. Take any other action at law or in equity which may be available to the County.

C. Failure to Cure Default. If PWE does not cure the default within the required period or, provided PWE pursues the cure with reasonable diligence, such longer period as may be agreed to by both parties if the default may not reasonably be cured within the required period, then the County may avail itself of any remedy afforded it by law and any of the above cumulative, nonexclusive remedies. Provided, however, that if PWE fails to comply with any obligation of the Agreement and the County reasonably determines that such failure has caused or is causing an immediate danger to public health and safety, the County may, in its reasonable discretion, immediately and without further notice PWE avail itself of any remedy afforded it by law and any of the above cumulative non-exclusive remedies. The County shall make reasonable efforts to notify PWE prior to drawing on a letter of credit or other security, but failure to provide such Notice shall not invalidate the County's actions. In any legal proceeding to enforce this Agreement, the County shall be entitled to recover its reasonable attorney fees and suit costs as determined by the adjudicator.

E. No Waiver Implied. If any condition, obligation, or agreement contained in this Agreement is breached by either Party and thereafter waived in writing by the opposite

Party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other concurrent, previous or subsequent breaches hereunder. All waivers must be in writing to be effective.

- F. No Remedy Exclusive. No Remedy herein conferred upon or reserved to the County shall be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall either impair any such right of power or be construed as a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.
13. Indemnification. Anything to the contrary herein notwithstanding, the County and its elected and appointed officials, officers, agents, employees, representatives, and volunteers shall not be liable or responsible in any manner to PWE, its contractors or subcontractors, material men, laborers, or to any other person or persons whomsoever, for any claims, demands, damages, actions or causes of action of any kind or character whatsoever arising out of, any and all work which is PWE's obligation to perform pursuant to this agreement; the failure of PWE to observe or perform any covenant, condition, or obligation or agreement on its part to be observed or performed under this agreement; the failure by PWE to pay contractors, subcontractors, laborers, or material men; the failure by PWE to pay for material or; the failure by PWE to obtain necessary permits authorization to construct or perform work to the extent that such claims, demands, damages, actions or causes of action were not contributed to or caused by the County or its elected or appointed officials, officers, engineers, agents, employees, representatives, or volunteers. PWE agrees to indemnify, defend, and hold the County, its elected or appointed officials, officers, engineers, agents, employees, representatives, or volunteers harmless from (a) all such claims, demands, damages, actions or causes of action , and all costs, disbursements, and expenses resulting from such claims, including reasonable attorneys' fees, to the extent that such claims, demands, damages, actions or causes of action were not contributed to or caused by the County or any of its elected or appointed officials, officers, engineers, agents, employees, representatives, or volunteers; and, (b) all third party claims, demands, damages, actions, or causes of action, and all costs, disbursements, and expenses resulting from such claims, including reasonable attorneys' fees, arising out of PWE's duties and obligations under this agreement.
14. Binding Effect. This agreement shall be binding upon, and inure to the benefit of PWE and the County and their respective successors-in-interest, assignees, legal representatives, lessees, and all other persons or entities acquiring all or any portion of the Project, any lot, parcel, or any portion thereof within the Project, or any interest therein, whether by sale, operation of law, devise, or in any other manner whatsoever. The Developer shall be responsible to make certain all of its contractors, subcontractors, agents, employees, and representatives comply with all terms of this Agreement.
15. This Agreement may be executed in one or more counterparts each of which shall be deemed an original but all of which shall constitute one agreement.

IN WITNESS WHEREOF, this Agreement is executed effective as of the day and year first written above and executed by their respective and duly authorized officers or agents:

PLYMOUTH COUNTY, IOWA:

By: Don Koss

Name: Don Koss

Title: Chairman Board of Supervisors

PLYMOUTH WIND ENERGY LLC:

By: _____

Name: _____

Title: _____

