

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2009-03

Petitions of Michael Laflamme and Howard Jones (including 116 Registered Voters from Berlin and 104 Registered Voters from Gorham) for Review of a 29 MW Biomass Power Plant Developed by Clean Power Development, LLC and Located in Berlin, Coos County, New Hampshire

**FINAL ORDER DENYING PETITIONS
FILED BY MICHAEL LAFLAMME AND HOWARD JONES
April 7, 2010**

Background

The Clean Power Development, LLC Berlin Project ("CPD Facility" or "Project") is a 29 megawatt (MW) Biomass Power Plant proposed to be located at 20 Shelby Street in Berlin, New Hampshire. The CPD Facility is a Renewable Energy Facility¹ of less than 30 megawatts, but greater than 5 megawatts.

On November 25, 2009, Michael Laflamme of Berlin, New Hampshire and Howard Jones of Gorham, New Hampshire each filed a petition signed by over 100 registered voters (hereinafter referred to as the "Berlin Petition" and "Gorham Petition" respectively, or "Petitions" collectively) with the Site Evaluation Committee (the "Committee" or "SEC") requesting that the Committee assert jurisdiction over the Clean Power Development, LLC project located in Berlin, Coos County, New Hampshire and require Clean Power Development, LLC (CPD) to apply for a certificate of Site and Facility. The Petitions comport with the standards set forth in RSA 162-H:2, XI. Clean Power Development, LLC, objected to the Petitions in a timely manner. On January 29, 2010, the Committee commenced an adjudicatory proceeding and heard evidence from both of the Petitioners and from CPD. On February 3, 2010, the Committee publicly considered the Petitions in a deliberative session. After due consideration, the Committee unanimously voted to deny the Petitions. Therefore, CPD is not required to obtain a Certificate of Site and Facility prior to the siting, construction and operation of the Facility. This Order memorializes the reasons for the denial of the Petitions.

Procedural History

The Petition

The Petitions urge the Committee to assert jurisdiction over the Project in order

¹ A "renewable energy facility" means electric station generating equipment and associated facilities designed for, or capable of, operation at a nameplate capacity of greater than 30 megawatts but less than 120 megawatts and powered by wind energy, geothermal energy, hydrogen derived from biomass fuels or methane gas, ocean thermal, wave, current, or tidal energy, methane gas, biomass technologies, solar technologies, or hydroelectric energy. See, RSA 162-H:2, XII.

to determine "whether it is consistent with state energy policy and whether it will have a significant impact upon the local and state environment and the orderly development of the region." The transmittal letter accompanying the Petitions requests Committee review because a different biomass project proposed to be located in the City of Berlin will require Committee approval, and because the Petitioners have concerns regarding truck traffic in the abutting neighborhood. Additionally, they are concerned with ancillary projects slated for the CPD Facility, such as algae cultivation. The Petitioners also suggest that Committee review is necessary to properly gauge the financial viability of the CPD Facility.

CPD's written response

On January 8, 2010, CPD filed a written response to the Petitions. In its response, CPD describes the project as a renewable biomass fueled electric generating facility capable of generating not more than 29 MW of gross power. The CPD facility is located at 20 Shelby Street in Berlin. CPD asserts that the site is a "Greenfield", explaining that no other facilities have existed at the site. CPD asserts that the project will use 340,000 tons of biomass per year. CPD asserts that its project size is based on a study performed by Innovative Natural Resource Solutions, LLC that concluded that there was a maximum of 30 MW of fuel available at a reasonable cost on a sustainable basis within a 30 mile radius of the Facility. CPD also reports that it intends to sell steam to the Fraser/Gorham Mill, thus decreasing the use of fossil fuels at that mill.

CPD opposes the relief requested in the Petitions for the following reasons:

1. CPD asserts that Committee review is not needed to maintain a balance between the environment and the need for energy, because the facility is using the best available technology and is subject to new source emission standards for air pollution control. CPD also asserts that it will utilize the City of Berlin Wastewater Treatment Facility, thereby reducing effluent discharges to the Androscoggin River. Finally, CPD asserts that there is no need to balance the environmental concerns against the need for energy because the facility has been designed with that balance in mind. According to CPD, the facility is sized so that it will not exceed the sustainable supply of biomass, and thus will support responsible forestry management practices and reduce the overall carbon footprint of the project by decreasing the amount of diesel fuel needed to transport biomass to the CPD Facility.

2. CPD asserts that Committee review is not necessary to avoid undue delay in construction, or to ensure timely analysis of the environmental consequences of the project. In this regard, CPD claims that Committee review will take approximately nine months and could cause CPD to lose access to federal stimulus monies, loan guarantees and specialized tax credits and grants. CPD asserts that it has completed review of all local permits and that all state permits have been granted with the exception of the wetlands permit. CPD also asserts that this plant will be the most efficient biomass facility in the State of New Hampshire, and that effluent discharge into the Androscoggin River will be reduced as a result of the project.

3. CPD claims that Committee review is not necessary for complete disclosure to the public because it has already participated in numerous appearances before the zoning and planning boards of the City of Berlin, and has participated in all of the state permitting processes to the point where all state permits, except the wetlands permit, have been granted. CPD also claims that its efforts have been widely publicized in the local press.

4. CPD also claims that Committee review is not necessary because the local and state review processes have already treated the project as a significant aspect of land use planning, and that all issues have been resolved in an integrated process before the various city and state boards and agencies, including the participation of the City Manager and the City Planner throughout the process.

City of Berlin's Written Response

The Committee also received written correspondence from the City of Berlin. The City of Berlin supports the project and recommends that the SEC not assert jurisdiction. The City's letter outlines the various steps that have been taken within the City for review of the project. The highlighted steps are:

- Site Plan Review Approval from the Berlin Planning Board, last amended August 4, 2009
- Three Special Exceptions from the Zoning Board of Adjustment March 11, 2009
- Alteration of Terrain Permit dated September 4, 2009 (Permit AoT:0030)
- Temporary Permit and Non-Attainment New Source Review (NSR) Permit from the Air Resources Division of the New Hampshire Department of Environmental Services (DES) - (Permit: TP-0033)
- CPD has applied to DES for a Shoreland Permit in accordance with RSA 483-B:5
- CPD has applied for a Wetlands Permit and is currently working with DES to secure a mitigation solution for wetlands disturbance
- CPD has submitted storm water management plans to EPA

The City reports that the issue of truck traffic was addressed at site plan review and that CPD will construct a new road between Unity and Shelby Streets. If CPD is unable to build a new road between Unity Street and its property on Shelby Street, it will have to come back to the Planning Board for review and approval of an alternative. The Site Plan approval also indicates that Shelby Street will need to be brought up to city street

standards by CPD and that no certificate of occupancy shall be issued until city street standards are met.

Based on the foregoing the City supports the project and requests that the Committee not exercise its jurisdiction.

The Hearing

On January 29, 2010, the Committee commenced a duly noticed adjudicatory hearing.

Howard Jones and Michael Laflamme testified and presented exhibits on behalf of the Petitioners. Michael Laflamme identified himself as a boiler operator with Fraser Paper for twenty five years, currently employed in northern Vermont operating two wood fired boilers and a turbine generator. Tr. 1, p. 17.² Howard Jones identified himself as a process control engineer with the responsibility for overseeing advanced computer controls on recovery boilers. Tr. 1, p. 20. The Petitioners assert that it is not their intention to undermine the CPD project, but that they believe that all projects should be judged on the same basis and using the same process, that being the Site Evaluation Committee process. The Petitioners raised several issues in the course of their testimony.

The Petitioners each expressed concern regarding the relationship between CPD and Concord Steam. Concord Steam Corporation is owned and operated by Peter Bloomfield. Mr. Bloomfield is the Vice President of CPD. The Petitioners submitted an OSHA news release asserting that Concord Steam had recently been cited for 73 violations of safety standards at its Concord facility and was facing a fine of more than \$100,000.00. See, Petitioner's Exhibit 3; Petitioner's Exhibit 2, slide 19 – 20; Tr. 1, p. 18; Tr. 1, p. 34 – 36.

The Petitioners also expressed concerns about the capacity of the existing roadways in the vicinity of the proposed facility to handle increased truck travel. Using computer presentation equipment and software, the Petitioners presented a series of photographs of existing roads and argued that the existing roads were incapable of accommodating the increased use required by the proposed facility. See, Petitioner's Exhibit 2; Tr. 1, p. 26 – 30. The Petitioners also claimed that there was insufficient information made publicly available about CPD's plans to construct a new road between Unity and Shelby Streets. Tr. 1, p. 41. Similarly, the Petitioners testified that there was insufficient public information concerning the facility itself, despite the fact that CPD referred to the project as "shovel ready." Tr. 1, p. 37.

The Petitioners also disputed the biomass resource study presented by CPD

² An adjudicatory hearing was held on January 29, 2010. References to the transcript of that proceeding are identified as Tr. 1, p. _____. A deliberative session was held on February 3, 2010. Reference to the transcript of that proceeding is identified as Tr. 2, p. _____.

and argued that Committee review would put all potential projects in the area on the same footing.³ The Petitioners also asserted that the size of the CPD project - 29 MW - was derived for the sole purpose of avoiding the requirement of a Certificate of Site and Facility under RSA 162-H: 2, XII. Finally, the Petitioners expressed concerns that the local procedures used by the City of Berlin were not well informed, Tr. I, p. 38, and may have been subject to the personal biases of city officials, Tr. I, p. 55.

CPD presented the testimony of Melvin Liston and William Gabler. Mr. Liston is the President of CPD and Mr. Gabler is employed as the project manager. Tr. I, p. 67-68. CPD's witnesses testified that the sizing of the proposed facility was directly related to the Biomass Fuel Availability study prepared by Innovative Natural Resources Solutions, LLC (the Wood Basket Study). The Wood Basket Study concluded that the net available biomass fuel (between 200,000 and 300,000 tons), when combined with one third of the traditional pulpwood harvest⁴, would support approximately 30 MW of new biomass fueled generation. See, CPD Exhibit 1, p. 39. Mr. Liston testified that the Wood basket Study was commissioned to take a conservative view of the resource availability, limiting the area of available biomass to a thirty mile radius of the proposed facility. Mr. Liston explained that such conservative assumptions would limit the volatility of pricing for biomass fuel, as use of locally harvested biomass would insulate the price from the cost of diesel fuel used in transportation of the biomass and from weather and other environmental conditions that could affect the cost of the biomass. Tr. I, p. 79; 88. Mr. Liston also testified that the proposed facility would employ a boiler that would permit the proposed facility to generate either electricity for distribution to the electric grid or steam that could be distributed to the existing Fraser Paper Mill in Gorham, and decrease that mill's reliance on oil for steam generation. Tr. I, pp. 80-81. Mr. Liston testified that the sizing of the proposed facility was entirely related to the Wood Basket Study and that once size was determined, CPD chose to seek local approvals through the city processes in order to show its good will toward the city. Tr. I, p. 82-83.

CPD also presented testimony and evidence concerning the development of a new road between Unity Street and Shelby Street. Mr. Gabler testified that the construction of the new road would eliminate the truck traffic on Goebel Street envisioned by the Petitioners. He also testified that the road construction portion of the project had been fully vetted by the City of Berlin Planning and Zoning Boards, with ample opportunity for public comment. Tr. I, p. 95. CPD introduced minutes of the Berlin Planning Board, see, CPD Exhibit 6, and the Berlin Zoning Board of Adjustment, see, CPD Exhibit 7. Although public participation at the hearing was minimal, the minutes demonstrate that the public had the opportunity to address both municipal boards in public session to raise any concerns. See, CPD Exhibits 6 & 7. Mr. Gabler

³ The Petitioners made frequent reference to a 70 megawatt biomass fueled facility also proposed to be operated in Berlin by Laidlaw BioPower, LLC (Laidlaw). The Laidlaw project is subject to Committee review in docket no. 2009-02. The Petitioners assert that these projects would compete with each other for both biomass supply and transmission line capacity. However, no evidence regarding the Laidlaw project was received in this docket and we are incapable of making such comparisons on this record.

⁴ The Wood Basket Study assumed that the closure of two pulp mills in Coos County would redirect approximately one-third of the pulp wood production to biomass. See, CPD Exhibit 1, p. 35.

also testified that CPD's special exception and zoning variances each had a condition that requires a return to the local boards in the event that CPD cannot construct the road. The conditions also require CPD to ensure that the re-constructed Shelby Street meets city standards. See, CPD Exhibit 6.

Finally, CPD provided evidence that, in addition to obtaining site plan approval from the Berlin Planning Board and a renewable energy special exception and certain variances from the Berlin Zoning Board of Adjustment, Tr. I, p. 97 -98, it had obtained the following state permits:

State of New Hampshire Air Permit (Temporary Permit and Non-Attainment New Source Review Permit # TP-0033)

State of New Hampshire Alteration of Terrain Permit (AOT # 0030)

State of New Hampshire Shoreland Permit (# 2009-02205)

See, CPD Exhibit 3; Tr. I, p. 99 – 101. In addition, Mr. Gabler testified that CPD has made good progress in pursuing a Wetlands Permit through the Department of Environmental Services and had recently agreed to make a wetlands mitigation payment to the State. While review and comments for the New Hampshire Division of Historic Resources are still pending, the application for the Wetlands Permit is in its final stages.

Representatives from the City of Berlin also testified at the hearing. Paul Grenier, Mayor of Berlin, testified and requested that the Committee respect the permitting process exercised by the City. He advised the Committee that the City review process fully vetted the project and that he had confidence in the technical capabilities of the City Planning Office, the Planning Board and the Zoning Board of Adjustment. Tr. I, p. 164-167. Pamela Laflamme, City Planner for Berlin, also testified. She provided the Committee with an overview of the planning resources available to the City and the process used by the City in reviewing CPD's project. Ms. Laflamme also advised the Committee that all records pertaining to the City's review of the proposed facility are, and have been, open to the public for inspection at her office. She also advised that the process used by the City was a public process. Tr. I, p. 176-181.

After concluding the testimony the Committee also permitted public comment.

The hearing that commenced on January 29, 2010, was recessed until February 3, 2010. On February 3, 2010, the Committee met in deliberative session and after substantial review and consideration of the issues, voted to deny the Petitions.

Legal Analysis

A. Jurisdiction

In accordance with RSA 162-H: 2, XII, the Committee has jurisdiction over renewable energy facilities "of 30 megawatts or less nameplate capacity, but at least 5 megawatts which the Committee determines requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1 either on its own motion or by petition of the applicant, or 2 or more petitioners as defined in RSA 162-H:2, XI."

In the instant matter, the CDP facility is a renewable energy facility of less than 30 megawatts, but greater than 5 megawatts. The Berlin Petition and the Gorham Petition both satisfy the requirements of RSA 162-H: 2, XI. The question for the Committee is whether a certificate should be required, consistent with the findings and purposes set forth in RSA 162-H: 1.

B. Legal Standard for Requiring a Certificate

Before it can assert jurisdiction, the Committee must find that the requirement of Certificate is consistent with the findings and purposes set forth in RSA 162-H:1. The purpose of RSA 162-H:1 is to "assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principals." Specifically, the Committee must determine whether a Certificate is needed to:

- (1) Maintain a balance between the environment and the need for new energy facilities in New Hampshire;
- (2) Avoid undue delay in the construction of needed facilities and provide full and timely consideration of environmental consequences;
- (3) Ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and,
- (4) Ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

In considering whether this project will require Committee review and a Certificate of Site and Facility, the Committee must consider the foregoing purposes of the siting statute. If the Committee finds that review is not necessary to achieve the goals of the statute, then the Committee should deny the petitions. However, if the Committee decides that the goals of the statute are best met by requiring review, then the Petitions should be granted. In this case, review is not necessary and the Petitions will be denied.

Discussion

A. The Balance Between the Environment and the Need for New Energy

At the outset, it should be noted that New Hampshire is a state that produces more energy than it consumes. Tr. II, p. 15. However, the state has set forth goals that describe the need for new renewable energy. These goals are set forth in the state's renewable energy portfolio standards statute, RSA 362-F, and in the Governor's "25X25" plan to obtain at least 25% of the state's total energy needs from renewable sources by the year 2025 See, e.g. Executive Order No. 2007-003. In this regard, the Committee recognizes that the State of New Hampshire maintains a need for new, clean and renewable energy sources. It is against this need that the Committee will balance the effect of the proposed facility on the environment.

In assessing the balancing test between the environment and the need for new energy, the Committee recognizes that substantial environmental permitting has already occurred or is well underway. CPD has obtained an air permit, an alteration of terrain permit, a shoreland permit, and is in the final stages of obtaining a wetlands permit. At the adjudicatory hearing, CPD advised that it had chosen to make a mitigation payment to the DES in the sum of \$76,000.00 to complete the wetlands permitting process. Tr. 1, p. 101. In addition, the New Hampshire Division of Historical Resources will be submitting comments to the DES to complete the wetlands permit. It appears as though CPD has undertaken, through various state permitting agencies, to ensure that the environment is protected as this project is sited and constructed. In addition, the proposed Project will use waste water from the City of Berlin Waste Water Treatment Facility for cooling purposes and thereby decrease the flow of effluent into the Androscoggin River.

In finding that a Certificate of Site and Facility is not necessary in order to maintain a balance between the environment and the need for new energy, the Committee also recognizes that the site for the proposed Project is already in an industrial area, abutting the City of Berlin's Waste Water Treatment Facility. This Project is not sited in an area of pristine wilderness but is, in fact, consistent with its existing neighborhood. Finally, the Committee notes that the City of Berlin has folded many of the environmental considerations into its review processes. The City has specifically researched and adopted a renewable energy ordinance that provides for a special exception review by the Zoning Board of Adjustment for such projects. In addition, it appears that many of the environmental concerns have also been addressed in the consideration of the Project by the City departments. Therefore, it is not necessary for CPD to file an Application for a Certificate of Site and Facility and obtain approval from this Committee in order to maintain a balance between the environment and the need for new energy.

B. Undue Delay

Asserting jurisdiction will likely cause, rather than avoid, undue delay in the

construction of needed facilities. The status of CPD's state permitting process and the review undertaken by the City planning process also assists this Committee in determining that SEC review is not necessary. Based upon the record of these proceedings, it appears that further review by the Committee would be unnecessarily duplicative of the work already undertaken by the various state agencies and the City of Berlin. In fact, review by the Committee would likely require CPD to prepare and file a substantial Application. Thereafter, the process of review of that Application by the Committee, as well as the holding of both public informational hearings and adjudicatory proceedings, would last approximately eight months. Such a delay is unnecessary in this case because CPD has already obtained most of the environmental review that is required for the Project. Therefore, the Committee finds that asserting jurisdiction would not avoid undue delay and, in fact, would cause undue delay and unnecessary duplication of review that has already been completed by local and state authorities and agencies.

C. Full and Complete Disclosure

At the hearing in this case, the Petitioners complained that they were "left in the dark" about the scope of the proposed facility, as well as the construction of the proposed connecting road between Unity Street and Shelby Street which is part of the project. However, the record also reveals that the Petitioners were aware of the review process being conducted by the City of Berlin. Tr. I, pp. 38-41. The record further reflects that all of the hearings conducted by the City of Berlin Planning Board and Zoning Board of Adjustment were public hearings and that the Petitioners simply chose not to attend. Tr. I, p. 38. The processes used by the City were open. All of the City meetings were noticed in the local press and permitted members of the public to voice their opinions. Additionally, the results of those proceedings were well published in the local press. Additionally, the minutes from all of the various Planning Board and Zoning Board of Adjustment meetings were publically available. Likewise, the site plan and the road plans were, and still are, publically available in the Office of the City Planner for Berlin.

Similarly, the Department of Environmental Services conducted a public process in determining whether or not to grant an air permit to CPD. CPD's alteration of terrain permit, shoreland permit, and wetlands application are all public records that are freely open to review by any member of the public.

Committee review would add little to providing full and complete disclosure to the public of CPD's plans for the siting, construction and operation of this renewable energy facility.

D. Significant Aspect of Land Use Planning

The record supports a finding by this Committee that the City of Berlin used an integrated review process to consider those issues of land use planning that relate to this Project. A review of the minutes of the meetings from the Zoning Board of

Adjustment and Planning Board demonstrate that these local boards considered numerous factors pertaining to the siting and construction of this Project. See, CPD Exhibits 5 and 6. Many of the considerations are very similar to the considerations that would be addressed by this Committee. In addition, CPD has obtained, or is about to obtain, all of the necessary state permits which also bear on land use planning considerations. The Committee notes that the site for the proposed Project is a "greenfield", and there is no prior use that would normally create environmental issues, historical review issues, or other planning issues. Access to the facility has been well addressed by CPD and the City of Berlin, and CPD's construction of the project has been conditioned by the City on the completion of a connecting road between Unity Street and Shelby Street which would provide for better ingress and egress for the trucking that will accompany the operation of this facility. In addition, CPD has indicated that it will be bonding this Project so that, once construction has commenced, there will be economic resources available to the City in the event that construction is not completed. Tr. I, p. 121. Finally, the Committee notes that the proposed facility has been completely reviewed by the City Planner, the Zoning Board of Adjustment, and the Planning Board of the City of Berlin, and also has been reviewed by the North Country Council, which is the regional planning agency. All of these local agencies support the siting and construction of this Project. On this record, the Committee finds that local review of this proposed Project has treated the Project as a significant aspect of land use planning in which all environmental, economic and technical issues are resolved in an integrated fashion and, therefore, there is no need for further review by this Committee.

Finally, some of the opposition to the CPD facility focused on the fact that the facility falls just short of the 30 MW jurisdictional size requirement. However, RSA 162-H:4 provides, even in the case of facilities that are larger than the jurisdictional size requirement, that the Committee may exempt a facility from the approval and certificate provisions of the statute if it determines that "[e]xisting state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1." The substance of the analysis and discussion above demonstrates that adequate protection of the objectives and purpose of RSA 162-H:1 is provided in these circumstances by the City of Berlin and the Department of Environmental Services.

Conclusion

Having considered the record of this matter and the legal standards to be applied, the Committee finds that it is not necessary to assert Committee jurisdiction in this matter in order to comply with the purposes set forth at RSA 162-H:1. Therefore, the Committee denies the Petitions and will not require CPD to file an Application for a Certificate of Site and Facility.

Thomas S. Burack

4/7/10

Thomas S. Burack, Commissioner
Dept. of Environmental Services
Chairman

Date

Thomas B. Getz

4/7/10

Thomas B. Getz, Chairman
Public Utilities Commission
Vice Chairman

Date

Clifton C. Below

4/7/10

Clifton C. Below, Commissioner
Public Utilities Commission

Date

Amy L. Ignatius

4/7/10

Amy L. Ignatius, Commissioner
Public Utilities Commission

Date

Michael Harrington

4/7/10

Michael Harrington, Designated Engineer
Public Utilities Commission

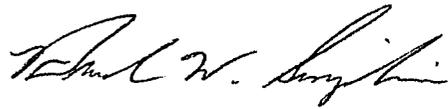
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Glenn Normandeau, Director
Fish and Game Department

4/7/10

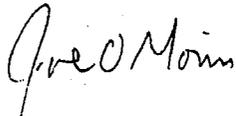
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Brad Simpkins, Director
Division of Forests & Lands (DRED)

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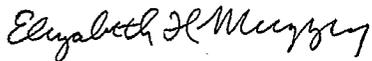
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Joanne Morin, Director
Office of Energy & Planning

4/7/10

Date



Elizabeth Muzzey, Director
Division of Historical Resources

4/7/10

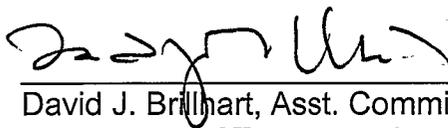
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Robert Scott, Director
Air Resources Division (DES)

4/7/10

Date



David J. Brillhart, Asst. Commissioner
Department of Transportation

4/7/10

Date