March 29, 2013

Commissioner Thomas Burack
Chair, New Hampshire Site Evaluation Committee
New Hampshire Department of Environmental Services
29 Hazen Drive
Concord, NH 03301
ATTN: Jane Murray, Secretary (jane.murray@des.nh.gov)

Re: No. 2013-01, Petition to Adopt Rules Establishing Procedures and Siting Criteria for Wind Powered Facilities

Dear Commissioner Burack:

The Appalachian Mountain Club (AMC), Audubon Society of New Hampshire (ASNH), Conservation Law Foundation (CLF), Society for the Protection of New Hampshire Forests(SPNHF), and The Nature Conservancy New Hampshire Chapter (TNC), strongly support the March 3, 2013 petition from the House of Representatives Science, Technology, and Energy Committee requesting the "*NH Site Evaluation Committee (SEC) per RSA 541-A:4 to adopt rules establishing procedures and siting criteria for applications for certificates for wind powered facilities*." The petition from the House Committee is not a new charge; rather, it represents a step towards completion of a task first initiated in 2006.

As background, our organizations are deeply committed to reducing society's dependence on fossil fuels through increased energy efficiency, conservation, and renewable energy technologies. In the wake of increasingly frequent severe weather events and rising temperatures, the economic, environmental, and societal impacts of climate change are undeniable and must be addressed through aggressive efforts to reduce the emissions causing climate change. Consistent with the state's Renewable Portfolio Standard law, Climate Action Plan, and other energy initiatives, we support the development of appropriately-sited wind energy facilities as an important component of New Hampshire's clean energy future. Terrestrial wind power is one of the most commercially advanced and readily available renewable energy sources for grid scale power generation today and is already playing a vital role in reducing greenhouse gas emissions from the electric sector in New England.

It also is clear, however, that, depending on their location, wind energy facilities can have significant ecological and aesthetic impacts. In New Hampshire, the better terrestrial wind resources are found on our higher ridgelines and mountaintops, often the least developed and visually significant landscapes in the state. While advancing technology is improving the viability of land-based wind power development in lower elevation areas and reducing the ecological and noise impacts of wind turbines, the industry is also increasing proposed turbine heights, presenting new siting challenges. For example, the most recent wind

project application considered by the SEC in 2013 involved turbines just shy of 500 feet, and future advances point to taller turbines and larger blades in the near future. For these and other reasons, wind project proposals raise important and legitimate concerns in local communities and among interested stakeholders at the state level.

The standards for issuance of a certificate set forth in RSA ch. 162-H speak in general terms about the reasonableness of adverse environmental, aesthetic, and other impacts of proposed projects. As discussed in numerous SEC decisions regarding wind and other energy facilities, the legal meaning of these standards is being developed piecemeal on a case-by-case basis, depending on the issues in dispute for specific projects. This approach to decision-making has created a great deal of uncertainty and confusion, risks inconsistency, and tends to put the SEC, the sitting members of which are frequently changing, in the position of "reinventing the wheel" with every new proceeding. With the increased level of interest in developing wind energy facilities in New Hampshire, the lack of a comprehensive and consistent framework for evaluating these projects puts the SEC, developers, and all interested stakeholders, at a significant disadvantage during the siting process. The SEC's review of wind energy facilities would greatly benefit from a clear and specific set of procedures and siting criteria that elaborate on the requirements set forth in RSA ch. 162-H.

This need to better clarify New Hampshire's wind power siting regulations is not a newly discovered one, as it surfaced years ago and was identified as an issue needing attention in the 2006 Laws of New Hampshire, Chapter 257, enacted May 25, 2006, and 2007 Laws of New Hampshire, Chapter 364, enacted July 17, 2007. These laws established, and then expanded, the State Energy Policy Commission (the Commission), charging it with the duty to study among other things "…*the regulatory process for siting commercial wind energy facilities in the state and the economic, environmental, visual, and ratepayer effects associated with such facilities*." A subcommittee of the Commission was charged with addressing this task, and the subcommittee then turned to a stakeholder group with various interests in wind energy to see if they could reach consensus on general guidelines for the siting of commercial wind energy facilities and bring their results back to the sub-committee[1]. This ad hoc group was comprised of environmental organizations, municipal and conservation associations, state and federal resource agencies, and wind energy representatives.

After 16 months of deliberations, the group brought forth a consensus document for the Commission's consideration. However, the Commission's deliberations were complicated at that time by the fact that there was an active wind facility application before the SEC, and several members of the Commission were sitting members of the SEC and therefore believed they were limited in their ability to participate in the Commission's discussion of wind siting. On November 24, 2008, the Commission agreed it was best to recommend that the ad hoc working group document, "*Proposed Wind Power Siting Guidelines – May 29, 2007*," be recommended to the House Science, Technology, and Energy Committee for their

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[1] State Energy Policy Commission's 2007 Interim Report, Dec. 1, 2007.

consideration and possible legislation in the 2009-2010 session.[2] No further action has since occurred, with the exception of the SEC posting the document on its web site as an informational resource. It is in the context of this history that the SEC is considering the March 3, 2013 petition of the House of Representatives Science, Technology, and Energy Committee requesting that the "*NH Site Evaluation Committee (SEC) per RSA 541-A:4 to adopt rules establishing procedures and siting criteria for applications for certificates for wind powered facilities"* and to use the 2007 document "*as a starting point understanding it needs updating in light of technological developments and more experience with siting than was the case in 2007.*"

The SEC's authority to engage in rulemaking for these purposes is clear. *See* RSA 162-H: 10, VI ("The site evaluation committee shall issue such rules to administer this chapter, pursuant to RSA 541-A, after public notice and hearing, as may from time to time be required."). Like many of the administrative agencies represented on the SEC, the Committee is empowered to craft rules that elaborate on the requirements of its enabling statute. *See In re Mooney*, 160 N.H. 607, 611 (2010) (administrative rules may "fill in details to effectuate the purpose of the statute" (quoting *Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 621 (2005)); *In re New Hampshire Dept. of Transp.*, 152 N.H. 565, 572 (2005) (where legislature does not provide "comprehensive standards" by statute, agency "necessarily retains discretion" to promulgate administrative rules with appropriate specific requirements consistent with overarching purpose of statute). Adopting specific procedures and criteria for wind energy facilities (or other energy facilities) is well within the SEC's statutory mandate.

The "*Proposed Wind Power Siting Guidelines – May 29, 2007"* provides for consideration in this petitioned rulemaking process a framework for (i) a pre-application project review process, (ii) more structured and transparent decision criteria for the SEC to determine unreasonable adverse impacts,[3] and (iii) considering conflicting State policies concerning energy development and resource protection priorities.

Our organizations strongly support a rulemaking proceeding by the SEC to develop administrative rules that clarify –for wind energy facility developers, local communities and residents, and the general public – the standards and requirements that the SEC will employ to ensure that wind energy facilities are reviewed in accordance with the purposes of RSA ch. 162-H. Our organizations understand that the SEC has limited resources and is without committee staff per se; however, this proposed rulemaking has a well-developed and vetted framework to use as a starting point. Furthermore, the adoption of such rules will narrow the grounds for potential uncertainty in the development and review of future

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2 State Energy Policy Commission's 2008 Final Report, Dec. 1, 2008.

3 The guidelines provided suggestions for improvements to the SEC's review process, with more emphasis on early consultation to identify most significant issues. They also identified 15 resource and social issues that should be considered in wind power siting and permitting. These include issues for which regulations are already well developed (e.g., water quality and wetlands), issues that are less specifically regulated but clearly relevant to the "no unreasonable adverse effect" permitting criteria (e.g., wildlife and aesthetics), and issues that are more general (e.g., consistency with regional conservation plans).

wind power projects, and has the potential to save the SEC time and resources in upcoming application reviews. Our organizations also offer our assistance to the SEC as appropriate; several of us bring experience from leading the earlier ad hoc group that was created at the request of the Energy Policy Commission in 2006. The lessons learned from this rulemaking effort would also potentially provide guidance for other SEC energy project reviews.

We urge that the rulemaking process should also:

- Not unduly abrogate the adjudicatory process, as SEC decisions have long-term implications and, though complicated, an efficient adjudicatory process provides the best opportunity to assure that project information is complete and well vetted.
- Strengthen and better clarify the role of counsel for the public.
- Acknowledge and ensure complete accounting of emissions reductions benefits associated with wind energy projects.
- Require in applications best available technologies and strategies when appropriate to mitigate impacts, rather than have such mitigation be a point of negotiation during the review process.
- Clarify what mitigation strategies, including land conservation, may appropriately compensate for adverse impacts.
- Require consistent decommissioning plans and funding to avoid the significant public liability and other problems associated with abandoned infrastructure, including ongoing aviation lighting requirements for abandoned towers.
- Assess not only site-specific impacts of individual projects, but also the cumulative impacts of multiple adjacent projects across a given landscape.
- Provide minimum standards for post-construction monitoring.

We believe that the SEC should adopt administrative rules, not nonbinding guidance. Stakeholders and developers should be able to rely on standards that have the force of law, and the SEC will stand on firmer ground in using rule-based procedures and criteria as the foundation for its decisions on applications.

If the SEC grants the petition, the SEC should ensure that its rulemaking process is fully transparent, solicits input from all stakeholders, and relies on sound science. In particular, we recommend that the SEC engage in an open and collaborative process to develop the language of the proposed rules, with ample opportunity for public input in writing and at stakeholder meetings. Given our experience with administrative rulemaking, relying solely on the formal portion of the rulemaking process required by RSA 541-A is insufficient to allow meaningful public engagement in the rules' development. We also believe that, with a strong framework to work from, the rulemaking effort should be designed to conclude by December 2013. Given the SEC's resource constraints, it may be logical to solicit assistance from the Office of Energy and Planning or another appropriate and staffed state agency to help facilitate the public input and rulemaking process.

We appreciate the SEC's consideration of these comments.

Respectfully submitted,

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