

STATE OF NEW HAMPSHIRE

JILL K. SIEVEKING
DIRECTOR



OFFICE OF LEGISLATIVE SERVICES

STATE HOUSE
107 NORTH MAIN STREET, ROOM 109
CONCORD, NEW HAMPSHIRE 03301-4951

12/1/15
Date

OBJECTION RESPONSE NO. 2015-11 + 12

RULE # Site 100-300

RELATIVE TO: RULES OF THE SITE EVALUATION COMMITTEE

Attached are comments from the Office of Legislative Services on your agency's Objection Response or Draft Objection Response to the preliminary or revised objection of the Joint Legislative Committee on Administrative Rules on the above cited rule.

If you have any questions, please call Scott F. Eaton at 271-3680.

Very truly yours,

Scott F. Eaton
Scott F. Eaton
Administrative Rules Director

Jill K. Sieveking
Jill K. Sieveking
Director

SFE/JKS

Enc.

JLCAR STAFF COMMENTS REGARDING OBJECTION RESPONSES 2015-11 AND 12:

1. The Public Interest Criteria (Site 301.16, OR 2015-12 Pg. 19):

The Site Evaluation Committee (SEC) proposes new public interest criteria in its objection response to the Joint Legislative Committee on Administrative Rules' (JLCAR's) preliminary objection to FP 2015-12. In reality, however, the SEC is proposing three separate amendments to Site 301.16 for JLCAR consideration. Each of these options adopts a different approach regarding the "public interest."

First Option:

The first option is set out in the objection response. It uses the language from the purpose clause RSA 162-H, found at RSA 162-H:1. In adopting these criteria, the SEC essentially takes the language the Legislature itself used and puts it into the rule. Industry advocates argue that this language is still objectionable because it requires that the SEC consider factors that are relevant to the other findings that the SEC must make under RSA 162-H:16, IV, leading to potentially contradictory results. If, when this rule is applied, it caused an internal inconsistency in the rules, it would be objectionable on the basis of clarity.

However, it resolves the prior comments on legislative intent and authority. Since the "public interest" is a separate finding, the factors the SEC now proposes may simply be relevant to more than one of the findings required in RSA 162-H:16, IV. While this language is not perfect, it appears to be the least objectionable of the three options. The Legislature instructed the SEC to adopt specific criteria relative to the public interest in RSA 162-H:10, VII, and stated something about what the public interest is in RSA 162-H:1. Of the three options presented to JLCAR, this one most closely tracks the language of the statute.

Second Option:

The other two options could only be made through responding to a revised objection, which the SEC states it is willing to ask for.

The second of the options would bring forward the same language that appeared in FP 2015-12. The SEC argues that this language would be valid because it is a proper interpretation of the purpose of the statute as expressed in RSA 162-H:1. Essentially, the SEC argues that, even considering the "public interest" language in RSA 162-H:1, these criteria properly interpret "public interest" under the statute. As indicated in staff comments to the final proposal, the criteria in this second option closely resemble those that were removed from Senate Bill 245 (SB 245) by the Senate Finance Committee (See attached).

A few updates to the legislative record are required.

First, the language in the purpose clause, RSA 162-H:1, is now more expansive than it was prior to the adoption of SB 245, suggesting that the language in RSA 162-H:1 represents aspects of the Legislature's view of the "public interest." Second, the rulemaking authority of the SEC expanded in SB 245. In House Amendment 2014-1442h, the House Science, Technology and Energy Committee expanded the SEC's rulemaking authority. Prior to the adoption of SB 245, the SEC had rulemaking authority relative to RSA 162-H:16, IV (b) and (c)(effects on orderly development and unreasonable adverse effects). Now, RSA 162-H:10, VII instructs the SEC to adopt specific criteria relative to all of RSA 162-H:16, IV, of which (e) is "issuance of a certificate will serve the public interest."

The SEC therefore argues that this new rulemaking authority and the expansion of the purpose clause permit it to interpret what the phrase "public interest" means by using its rules. If JLCAR is persuaded that the SEC's FP 2015-12 properly interpreted the law, then it could accept the SEC's request for a revised objection to reinsert that language, and issue a revised objection on that basis.

Third Option:

The third and final option would simply strike the public interest criteria entirely. This would apparently violate RSA 162-H:10, VII, which states that the SEC "shall adopt rules, pursuant to RSA 541-A, relative to the organization, practices, and procedures of the committee and criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility." Simply using the phrase "public interest," or striking it entirely, would not be "specific criteria." However, if JLCAR prefers this choice, it could accept the SEC's request for a revised objection, and issue a revised objection on that basis.

2. Cumulative Impacts (Site 301.14(g), OR 2015-12 Pgs. 5 and 18):

The SEC has chosen to change the language relative to cumulative impacts so that it only applies to wind projects. This addresses all bases for objection raised relative to cumulative impacts.

3. Issues Related to Municipal Preemption (Comments relate to the now removed criteria of Site 301.16, and to the authority to adopt these rules generally):

JLCAR's preliminary objection incorporated two separate and contradictory comments. Towns and individuals have argued that the SEC lacks the authority to preempt local ordinances, while industry representatives argue that these rules provide municipalities with a veto over the SEC, in violation of Supreme Court precedent. Neither are correct; the SEC has written a rule that comports with the law.

The Supreme Court case *PSNH v. Town of Hampton*, 120 N.H. 68 (1980) firmly establishes that the SEC has the authority to preempt local municipal ordinances and master plans. That authority is a power to wield and not a mandate to comply with. The law does not say that the SEC must preempt ordinances, simply that it can if it so chooses. If the SEC decided to allow an applicant to violate an ordinance, a town challenging that decision would not only lose in court, it would probably find its case dismissed for failure to state a claim. The SEC can, however, choose to issue a certificate that complies with local ordinances if it wishes to. Therefore, no bases for objection exist regarding municipal preemption.

4. Specific Criteria for Transmission Setbacks (Site 301.17(g), OR 2015-12 Pg. 20):

While the transmission setback criteria could be more specific, the SEC has articulated a standard, the public health, and the decision on what setback to require would be part of the SEC's full adjudicative process. In the opinion of JLCAR staff, this rule is sufficiently clear.

5. Site Control and Eminent Domain (Site 301.03(c)(6), OR 2015-12 Pgs. 3 and 4):

The SEC correctly states in its response that it has no authority to grant eminent domain. Here, the SEC merely states that it will begin considering an application if the applicant can prove that it seeks to obtain the right to use property in an eminent domain proceeding commenced through other law. This rule does nothing but shorten the application process. If this rule did not exist, the only effect would be to delay when the applicant could apply.

Rather than proving that the applicant had filed an application for eminent domain, it would have to finish its eminent domain proceeding, exercise its right to eminent domain, and then prove a current right. Presumably, if the SEC considered an application and the applicant's application for eminent domain was denied, the applicant would no longer be able to demonstrate site control, which would result in the SEC denying the application. Because this rule controls only the sorts of application the SEC will consider, and does not constitute a grant of eminent domain by the SEC, this rule is not objectionable.

6. Decommissioning Plans (Site 301.08(a)(7) and (c)(2), OR 2015-12 Pgs. 11 and 12):

JLCAR incorporated two decommissioning plan comments into its preliminary objection. On further review, neither presents a basis for a final objection.

The first comment argues that decommissioning plans should not include commercial financial guarantees, the second, that decommissioning plans should not exclude salvage value.

The nature of decommissioning plans appears to be a policy decision the SEC can make through its rulemaking authority. Regarding the second comment, while the language excluding salvage value may have been removed from a statute, RSA 162-H:7, V clearly requires decommissioning plans for all certificate applications, and the SEC's rulemaking authority in RSA 162-H:10, VI is broad enough to cover what constitutes adequate decommissioning plans. Because the statute is not unclear in this regard, there is no need to consider legislative history. Therefore, it appears that the SEC's decommissioning rules are valid.

7. EDP Renewable's other comments:

JLCAR staff agrees with the SEC's legal analysis. These appear to be policy decisions.

8. Staff comment: Scenic Quality (Site 102.44, OR 2015-11 Pg. 6):

Having reviewed the SEC's explanation, and having seen the SEC's attempts at clarifying the language at its various meetings, JLCAR staff now agrees that this term is probably as well defined as it possibly can be. The inherent subjectivity of the term, as the SEC's response indicates, defies further clarification. While a basis for objection still exists, given that it appears the rule cannot be consistently applied as written, it may be as clear as it can be.

Further, in light of the presence of the phrase "scenic quality" in other definitions, the SEC correctly states that it works better as a definition than as a substantive rule. Therefore, JLCAR staff will remove its comment on that basis.

9. Staff Comment: Subcommittee Formation, State Agency Member Designation, and Suspension of Certificates (Site 103.03(a) and (d)(1), OR 2015-11 Pgs. 8 and 9; Site 302.01(f) and 302.02(d), OR 2015-12 Pg. 24):

All of these comments are similar in that they deal with the improper use of "may" to control agency discretion. While the rules share a basis for objection, the provisions vary in their significance to the overall regulatory scheme.

The first, regarding the makeup of subcommittees, is procedural. The second, regarding the ability of SEC Committee members to assign alternates, may actually be an internal practice of the SEC and not a rule at all since it does not appear to affect the rights of those outside the agency. The last, regarding suspension and revocation of certificates, is both substantive and significant.

§ 3.8 of Chapter 4 of the *Manual* requires agencies to specify the parameters of agency discretion through the use of criteria. In essence, when a statute grants the agency the authority to do something, and the ability to implement rules to carry out that authority, it is the place of the agency to say under what circumstances it shall use that authority.

RSA 541-A:8 mandates agency compliance with the *Manual*, stating “each agency shall conform to a drafting and procedure manual for rules.” Unless an agency receives an exemption to the *Manual* in RSA 541-A:21, and many do, then it is required to follow *Manual* requirements.

That is not to say that JLCAR always objects when a rule does not comply with the *Manual*. JLCAR always retains the discretion regarding whether to object. When rules are procedural or relatively unimportant to the general regulatory scheme, the Committee has allowed agencies to use may in limited circumstances in the past.

The first two rules mentioned here fall into that category. They are relatively minor parts of the overall regulatory scheme. The agency ought to follow the *Manual*, but JLCAR might wish to allow the rules to proceed since it is unlikely either would ever be challenged in court, rendering a Final Objection legally ineffective.

The last provision, however, deals with the suspension or revocation of certificates. The agency repeatedly voiced concerns about limiting its statutorily granted authority. In discussing revocations at least one SEC member voiced the opinion that there would be a “continuum” along which violative conduct could fall, that there would be many factors to consider, and that the agency would like to maintain discretion to act in individual cases.

All of these concerns are valid, but none are unique to the SEC, nor does New Hampshire’s rulemaking process forbid agencies from taking them into consideration when they adopt rules.

An agency can retain its discretion, but it must set forth something about the bases on which it will suspend or revoke. Take, for example, Env-Hw 515.09 of the Department of Environmental Services (DES), which deals with revoking certificates in the hazardous waste context. It allows DES to revoke such a certificate for “good cause.” It defines good cause, and creates a continuum over which decisions could progress based on the severity of the conduct. While DES chose not to, it could even have included a catch all that would cover situations the agency had not thought of, as indicated in § 3.8 of Chapter 4 of the *Manual* on page 106. Env-Hw 515.09 does exactly what the *Manual* requires.

At this point the SEC has come forward with three remaining “mays.” It should be said that these rules contained many more noncompliant mays that have been removed throughout the process and replaced with shalls.

In light of the length of this rulemaking process, and to avoid further proceedings, JLCAR could either move to issue a final objection relative to these sections, or it could move to approve these rules despite the outstanding issue. If it wished to, JLCAR could also petition the SEC to enter rulemaking regarding whichever of the provisions JLCAR believed require further clarification.

The SEC indicates its willingness to simply remove the sections. In JLCAR staff's opinion, this would not address the concern for Site 103.03(a) and 302.01 and 302.02, but may remove the bases for Site 103.03(d)(1) if JLCAR determines it is an internal practice and not a rule pursuant to RSA 541-A:1, XV.

RSA 541-A:22, I states that "no agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired." As indicated by the various rules adopted by licensing agencies, rules relative to suspension and revocation of licenses are rules pursuant to RSA 541-A:1, XV. Therefore, removing the provisions would not resolve the bases for objection because it would result in an unwritten, and therefore invalid, rule.

10. SEC Public Hearing Rules (Site 201.03 and 201.04, OR 2015-11 Pgs. 12):

The changes to Site 201.03 remove the basis for objection. No change has been made to Site 201.04, and for reasons similar to those listed in item 10, above, the basis for objection remains.

11. Conditions of Certificate (Site 301.17, OR 2015-12 Pg. 19):

The changes to this rule remove the basis for objection.

12. Access to Site for inspection (Site 302.01(b), OR 2015-12 Pg. 23):

Since the rules no longer mandate a certain time period within which the inspectee must comply, and there appear to be no penalties for refusing to submit to an inspection, *Patel* no longer seems to be implicated. The SEC should be aware of RSA 595-B, which governs administrative search warrants. The Attorney General is currently considering the applicability of *Patel* to state agency searches, and the administrative search warrant statute appears to be a way of avoiding the issues presented by *Patel*.

TITLE XII

PUBLIC SAFETY AND WELFARE

CHAPTER 162-H

ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:1

162-H:1 Declaration of Purpose. – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; 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 that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

Source. 1991, 295:1. 1998, 264:1. 2009, 65:1, eff. Aug. 8, 2009. 2014, 217:1, eff. July 1, 2014.

TITLE XII

PUBLIC SAFETY AND WELFARE

CHAPTER 162-H

ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:7

162-H:7 Application for Certificate. –

I. [Repealed.]

II. All applications for a certificate for an energy facility shall be filed with the chairperson of the site evaluation committee.

III. Upon filing of an application, the committee shall expeditiously conduct a preliminary review to ascertain if the application contains sufficient information to carry out the purposes of this chapter. If the application does not contain such sufficient information, the committee shall, in writing, expeditiously notify the applicant of that fact and specify what information the applicant must supply.

IV. Each application shall contain sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, and shall include each agency's completed application forms. Upon the filing of an application, the committee shall expeditiously forward a copy to the state agencies having permitting or other regulatory authority and to other state agencies identified in administrative rules. Upon receipt of a copy, each agency shall conduct a preliminary review to ascertain if the application contains sufficient information for its purposes. If the application does not contain sufficient information for the purposes of any of the state agencies having permitting or other regulatory authority, that agency shall, in writing, notify the committee of that fact and specify what information the applicant must supply; thereupon the committee shall provide the applicant with a copy of such notification and specification. Notwithstanding any other provision of law, for purposes of the time limitations imposed by this section, any application made under this section shall be deemed not accepted either by the committee or by any of the state agencies having permitting or other regulatory authority if the applicant is reasonably notified that it has not supplied sufficient information for any of the state agencies having permitting or other regulatory authority in accordance with this paragraph.

V. Each application shall also:

(a) Describe in reasonable detail the type and size of each major part of the proposed facility.

(b) Identify both the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant's preferred choice.

(c) Describe in reasonable detail the impact of each major part of the proposed facility on the environment for each site proposed.

(d) Describe in reasonable detail the applicant's proposals for studying and solving environmental problems.

(e) Describe in reasonable detail the applicant's financial, technical, and managerial capability for construction and operation of the proposed facility.

(f) Document that written notification of the proposed project, including appropriate copies of the application, has been given to the appropriate governing body of each community in which the facility is proposed to be located.

(g) Describe in reasonable detail the elements of and financial assurances for a facility decommissioning plan.

(h) Provide such additional information as the committee may require to carry out the purposes of this chapter.

VI. The committee shall decide whether or not to accept the application within 60 days of filing. If the committee rejects an application because it determines it to be administratively incomplete, the applicant may choose to file a new and more complete application or cure the defects in the rejected application within 10 days of receipt of notification of rejection.

VI-a. Public information sessions shall be held in accordance with RSA 162-H:10.

VI-b. All state agencies having permitting or other regulatory authority shall report their progress to the committee within 150 days of the acceptance of the application, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.

VI-c. All state agencies having permitting or other regulatory authority shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after the application has been accepted.

VI-d. Within 365 days of the acceptance of an application, the committee shall issue or deny a certificate for an energy facility.

VI-e. [Repealed.]

VII. Notwithstanding any other provision of law, the application shall be in lieu of separate applications that may be required by any other state agencies.

VIII. This chapter shall not preclude an agency from imposing its usual statutory fees.

IX. The applicant shall immediately inform the committee of any substantive modification to its application.

Source. 1991, 295:1. 2009, 65:11-13, 24, VII, eff. Aug. 8, 2009. 2014, 217:12-14, 28, III, eff. July 1, 2014.

TITLE XII

PUBLIC SAFETY AND WELFARE

CHAPTER 162-H

ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:10

162-H:10 Public Hearing; Studies; Rules. –

I. At least 30 days prior to filing an application for a certificate, an applicant shall hold at least one public information session in each county where the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. At such session, the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the chairperson of the committee. The applicant shall arrange for a transcript of such session to be prepared and shall include the transcript in its application for a certificate.

I-a. Within 45 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the applicant shall hold at least one public information session as described in paragraph I in each county in which the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before said session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the presiding officer of the committee. The administrator, or a designee of the presiding officer of the committee, shall act as presiding officer of the information session. The session shall be for public information on the proposed facility with the applicant presenting the information to the public. The presiding officer shall also explain to the public the process the committee will use to review the application for the proposed facility.

I-b. Upon request of the governing body of a municipality or unincorporated place in which the proposed facility is to be located, or on the committee's own motion, the committee may order the applicant to provide such additional public information sessions as described in paragraph I as are reasonable to inform the public of the proposed project.

I-c. Within 90 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the site evaluation committee shall hold at least one public hearing in each county in which the proposed facility is to be located and shall publish a public notice not less than 14 days before such session in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facilities. The public hearings shall be joint hearings, with representatives of the agencies that have permitting or other regulatory authority over the subject matter and shall be deemed to satisfy all initial requirements for public hearings under statutes requiring permits relative to environmental impact. Notwithstanding any other provision of law, the hearing shall be a joint hearing with the other state agencies and shall be in lieu of all hearings otherwise required by any of the other state agencies; provided, however, if any of such other state agencies does not otherwise have authority to conduct hearings, it may not join in the hearing under this chapter; provided further, however, the ability or inability of any of the other state agencies to join shall not affect the composition

of the committee under RSA 162-H:3 nor the ability of any member of the committee to act in accordance with this chapter.

II. Subsequent public hearings shall be in the nature of adjudicative proceedings under RSA 541-A and shall be held in the county or one of the counties in which the proposed facility is to be located or in Concord, New Hampshire, as determined by the site evaluation committee. The committee shall give adequate public notice of the time and place of each subsequent hearing.

III. The site evaluation committee shall consider and weigh all evidence presented at public hearings and shall consider and weigh written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding. The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.

IV. The site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.

V. The site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee. The site evaluation committee and counsel for the public are further authorized to assess the applicant for all travel and related expenses associated with the processing of an application under this chapter.

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.

VII. As soon as practicable but no later than November 1, 2015, the committee shall adopt rules, pursuant to RSA 541-A, relative to the organization, practices, and procedures of the committee and criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility. Prior to the adoption of such rules, the office of energy and planning shall hire and manage one or more consultants to conduct a public stakeholder process to develop recommended regulatory criteria, which may include consideration of issues identified in attachment C of the 2008 final report of the state energy policy commission, as well as others that may be identified during the stakeholder process. Except for the cases where the adjudicatory hearing has commenced, applications pending on the date rules adopted under this paragraph take effect shall be subject to such rules. Prior to the adoption of rules under this paragraph, applications shall be continuously processed pursuant to the rules in effect upon the date of filing. If the rules require the submission of additional information by an applicant, such applicant shall be afforded a reasonable opportunity to provide that information while the processing of the application continues.

Source. 1991, 295:1. 1997, 298:27. 2007, 364:7. 2009, 65:14. 2013, 134:2, eff. June 26, 2013. 2014, 217:16, eff. July 1, 2014. 2015, 219:11, eff. July 8, 2015; 268:3, eff. July 20, 2015.

TITLE XII

PUBLIC SAFETY AND WELFARE

CHAPTER 162-H

ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:16

162-H:16 Findings and Certificate Issuance. –

I. The committee shall incorporate in any certificate such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility; provided, however, the committee shall not issue any certificate under this chapter if any of the state agencies denies authorization for the proposed activity over which it has permitting or other regulatory authority. The denial of any such authorization shall be based on the record and explained in reasonable detail by the denying agency.

II. Any certificate issued by the site evaluation committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. A certificate shall be conclusive on all questions of siting, land use, air and water quality.

III. The committee may consult with interested regional agencies and agencies of border states in the consideration of certificates.

IV. After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest.

V. [Repealed.]

VI. A certificate of site and facility may contain such reasonable terms and conditions, including but not limited to the authority to require bonding, as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary. Such certificates, when issued, shall be final and subject only to judicial review.

VII. The committee may condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period.

Source. 1991, 295:1. 2009, 65:18-21, 24, IX, eff. Aug. 8, 2009. 2014, 217:20-22, eff. July 1, 2014. 2015, 264:2, eff. July 20, 2015.

TITLE LV

PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A

ADMINISTRATIVE PROCEDURE ACT

Section 541-A:1

541-A:1 Definitions. – In this chapter:

I. "Adjudicative proceeding" means the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.

II. "Agency" means each state board, commission, department, institution, officer, or any other state official or group, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.

III. "Committee" means the joint legislative committee on administrative rules, unless the context clearly indicates otherwise.

IV. "Contested case" means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.

V. "Declaratory ruling" means an agency ruling as to the specific applicability of any statutory provision or of any rule or order of the agency.

V-a. "Electronic document" means a document which complies with requirements established in the drafting and procedures manual under RSA 541-A:8. For electronic documents, a requirement during the rulemaking process for a signature accompanying the filing of an electronic document shall be met if such signature complies with the requirements of RSA 294-E.

VI. "File" means the actual receipt, by the director of legislative services, of a paper or electronic document required to be submitted during a rulemaking process established by this chapter. The term "file" shall also apply to any other response, submission, or written explanation required during a rulemaking process established by this chapter.

VI-a. "Final legislative action" means the defeat of a joint resolution sponsored by the legislative committee on administrative rules pursuant to RSA 541-A:13, VII(b) in either the house or the senate, or the failure of the general court to override the governor's veto of the joint resolution.

VII. "Fiscal impact statement" means a statement prepared by the legislative budget assistant, using data supplied by the rulemaking agency, and giving consideration to both short- and long-term fiscal consequences and includes the elements required by RSA 541-A:5, IV.

VII-a. "Form" means a document that establishes a requirement for persons outside the agency to provide information to an agency and the format in which such information must be submitted. The term does not include any document, regardless of what the document is called, that (a) is provided by an agency to facilitate the submission of information that is required to be submitted to the agency by federal or state statute, regulation, or rule and does not add to or modify such requirement or (b) that is used only by the agency to provide information to persons outside the agency.

VII-b. "Internet content" means material that exists only on a website on the Internet.

VIII. "License" means the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.

IX. "Licensing" means the agency process relative to the issuance, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license, or the imposition of terms for the exercise of a license.

X. "Nonadjudicative processes" means all agency procedures and actions other than an adjudicative proceeding.

XI. "Order" means the whole or part of an agency's final disposition of a matter, other than a rule, but does not include an agency's decision to initiate, postpone, investigate or process any matter, or to issue a complaint or citation.

XII. "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party.

XIII. "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

XIV. "Presiding officer" means that individual to whom the agency has delegated the authority to preside over a proceeding, if any; otherwise it shall mean the head of the agency.

XV. "Rule" means each regulation, standard, form as defined in paragraph VII-a, or other statement of general applicability adopted by an agency to (a) implement, interpret, or make specific a statute enforced or administered by such agency or (b) prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency, whether members of the general public or personnel in other agencies. The term does not include (a) internal memoranda which set policy applicable only to its own employees and which do not affect private rights or change the substance of rules binding upon the public, (b) informational pamphlets, letters, or other explanatory material which refer to a statute or rule without affecting its substance or interpretation, (c) personnel records relating to the hiring, dismissal, promotion, or compensation of any public employee, or the disciplining of such employee, or the investigating of any charges against such employee, or (d) declaratory rulings. The term "rule" shall include rules adopted by the director of personnel, department of administrative services, relative to the state employee personnel system. Notwithstanding the requirements of RSA 21-I:14, the term "rule" shall not include the manual described in RSA 21-I:14, I or the standards for the format, content, and style of agency annual and biennial reports described in RSA 21-I:14, IX, which together comprise the manual commonly known as the administrative services manual of procedures. The manual shall be subject to the approval of governor and council.

XVI. "Standing policy committee" means a committee listed in rules of the house of representatives or the senate to which legislation including rulemaking authority was originally referred for hearing and report.

Source. 1994, 412:1, eff. Aug. 9, 1994. 2000, 288:2. 2006, 145:2, eff. July 21, 2006. 2009, 232:1, 2, eff. Jan. 1, 2010. 2010, 123:1, eff. July 1, 2010 at 12:01 a.m.; 123:2, eff. June 9, 2010. 2012, 62:1, eff. July 13, 2012.

TITLE LV

PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A

ADMINISTRATIVE PROCEDURE ACT

Section 541-A:8

[RSA 541-A:8 effective until September 11, 2015; see also RSA 541-A:8 set out below.]

541-A:8 Drafting and Procedure Manual. --

Each agency shall conform to a drafting and procedure manual for rules, developed by the director of legislative services and the commissioner of administrative services, subject to amendment and final approval by the committee. The manual shall be submitted for approval by the committee no later than March 31, 2000. If no manual is submitted by such date, the committee shall have the authority to develop, amend, and approve the manual. In either case, the committee shall provide final approval of the drafting and procedure manual no later than June 30, 2000. After June 30, 2000, the committee may propose further amendments to the manual. Any further amendments shall be subject to final approval by the committee. The director may require any agency to rewrite any rule submitted for filing to conform to this manual until that rule is adopted and filed under RSA 541-A:14 or RSA 541-A:19.

[RSA 541-A:8 effective September 11, 2015; see also RSA 541-A:8 set out above.]

541-A:8 Drafting and Procedure Manual. --

Each agency shall conform to a drafting and procedure manual for rules, including agency forms, developed by the director of legislative services and the commissioner of administrative services, subject to amendment and final approval by the committee. The director may require any agency to rewrite any rule, including any agency form, submitted for filing to conform to this manual until that rule is adopted and filed under RSA 541-A:14 or RSA 541-A:19 or the form is adopted pursuant to RSA 541-A:19-b.

Source. 1994, 412:1. 2000, 288:8, eff. July 1, 2000. 2015, 234:4, eff. Sept. 11, 2015.

TITLE LIX

PROCEEDINGS IN CRIMINAL CASES

CHAPTER 595-B

ADMINISTRATIVE INSPECTION WARRANTS

Section 595-B:1

595-B:1 Definition. – An inspection warrant shall be a written order in the name of the state, signed by a justice, associate justice or special justice of any municipal, district or superior court, directed to an official or employee of a state agency, municipality, or other political subdivision, commanding him to conduct any inspection, testing or sampling required or specifically authorized by state law or administrative rule, or municipal ordinance, code or regulation.

Source. 1981, 533:1. 1987, 342:1. 1991, 231:7, eff. Aug. 9, 1991.

Section 595-B:1-a

595-B:1-a Scope. – The uniform procedures set forth in this chapter shall be applicable to all persons authorized by law to act in the name of the state to conduct any inspection, testing or sampling, and who do not have legal consent for such inspection, testing, or sampling, including but not limited to officials or employees of state agencies, municipal fire departments, building inspectors, or other code enforcement officials, health officers, members of local land use boards, and assessing officials.

Source. 1991, 231:8, eff. Aug. 9, 1991.

Section 595-B:2

595-B:2 Requirements for Issue. –

I. An inspection warrant shall be issued only upon the request of an official or employee of a state agency, municipality, or other political subdivision and only upon a showing of probable cause supported by affidavit. The affidavit shall particularly describe the place, dwelling, structure, premises, vehicle or records to be inspected and the purpose for which the inspection is to be made. In addition, if testing or sampling is requested, the affidavit shall describe the time and manner of such testing or sampling. In all cases, the affidavit shall contain either a statement that the consent to inspect has been sought and refused, or facts or circumstances reasonably justifying the failure to seek such consent.

II. Probable cause, as required by paragraph I, shall be deemed to exist if either legislative or administrative standards for conducting a routine or area inspection, testing or sampling are satisfied with respect to the particular place, dwelling, structure, premises, vehicle or records, or there is probable cause to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, vehicle or records.

III. Before issuing an inspection warrant, a justice, associate justice, or special justice may examine the applicant and any other witness under oath, and shall satisfy himself of the existence of grounds for granting such application.

Source. 1981, 533:1. 1987, 342:2. 1991, 231:9, eff. Aug. 9, 1991.

Section 595-B:3

595-B:3 Issue; Contents. – If a justice, associate justice, or special justice is satisfied that probable cause for the inspection, testing or sampling exists, he shall issue the warrant particularly describing each place, dwelling, structure, premises, vehicle or record to be inspected, tested or sampled, designating on the warrant the purpose and limitations of the inspection, testing or sampling, including the limitations required by this chapter. The person issuing a warrant shall retain each affidavit submitted in support of any warrant and shall either make personal notes of the substance, or arrange for a transcript, of any oral statements made under oath supplementing the affidavit. The person issuing the search warrant shall then deliver the affidavit and the notes or transcript within 3 days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of a warrant, the accompanying affidavit and the notes or transcript shall be attached to and filed with the warrant by the clerk of the court to which the warrant is returned. Warrants shall be public documents upon their return unless otherwise ordered by a court of record.

Source. 1981, 533:1, eff. Aug. 29, 1981.

Section 595-B:4

595-B:4 Duration. – An inspection warrant shall be returned to the court to which it is made returnable as soon as it has been executed, and in any event not later than 7 days from the date of its issuance, unless extended or renewed by the justice, associate justice, or special justice who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. An inspection warrant shall be executed and returned to the person by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, shall be void.

Source. 1981, 533:1, eff. Aug. 29, 1981.

Section 595-B:5

595-B:5 Conduct of Inspection; Notice. – An inspection, testing or sampling pursuant to a warrant issued under this chapter shall not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, unless specifically authorized by the person issuing such warrant upon a showing that such authority is reasonably necessary to effectuate the purpose of the law, rule, code, ordinance, or regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the person issuing such warrant may expressly authorize a forcible entry when facts are shown sufficient to suggest a probable violation of a state law or rule, or municipal ordinance, code, or regulation, which, if such violation existed, would present an immediate threat to public health or safety, or when facts are shown which establish that reasonable attempts to serve a previous warrant have been unsuccessful. Notwithstanding any law to the contrary, an official or employee of a state agency, municipality, or other political subdivision executing an inspection warrant may be accompanied by suitable assistants, including a sheriff or his deputy, any state police officer, or any constable or police officer of any city or town.

Source. 1981, 533:1. 1987, 342:3. 1991, 231:10, eff. Aug. 9, 1991.

Section 595-B:6

595-B:6 Receipt for Samples; Inventory and Return. – An official or employee of a state agency,

municipality, or other political subdivision executing an inspection warrant shall give a copy of the warrant to the person owning or occupying the particular place, dwelling, structure, premises, vehicle or records which are the subject of the warrant, or in the absence of such person, the official or employee shall leave a copy of the warrant at the place, dwelling, structure, premises or vehicle where the inspection is made. In addition, if an official or employee of a state agency, municipality, or other political subdivision takes samples under an inspection warrant, he shall give to the person from whom, or from whose premises, the samples were taken a receipt for the samples taken, or shall leave the receipt at the place from which the samples were taken. The return shall be made promptly and shall be accompanied by a written inventory of any samples taken. The justice of a court of record shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with a clerk of the court to which the warrant is returnable.

Source. 1981, 533:1. 1987, 342:4. 1991, 231:11, eff. Aug. 9, 1991.

Section 595-B:7

595-B:7 Evidence. – Failure to obtain an inspection warrant or to execute such a warrant in accordance with this chapter or the terms of the warrant shall not be cause for the exclusion of evidence derived from or obtained pursuant to any inspection, testing, or sampling, in any civil or criminal proceeding, if the receipt of such evidence is otherwise permitted by law.

Source. 1981, 533:1, eff. Aug. 29, 1981.

Section 595-B:8

595-B:8 Refusal to Permit Authorized Inspection. – Any person who knowingly refuses to permit an inspection, testing or sampling lawfully authorized by a warrant issued pursuant to this chapter shall be guilty of a misdemeanor.

Source. 1981, 533:1, eff. Aug. 29, 1981.

Section 595-B:9

595-B:9 Application Limited. – This chapter shall not apply to the application for warrants by personnel within the department of fish and game and the division of state police, and shall in no way affect the issuance of warrants at the request of persons within the department or division under other provisions of law.

Source. 1981, 533:1. 1987, 342:5, eff. July 24, 1987.

TITLE LV

PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A

ADMINISTRATIVE PROCEDURE ACT

Section 541-A:22

541-A:22 Validity of Rules. –

[Paragraph I effective until September 11, 2015; see also paragraph I set out below.]

I. No agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter.

[Paragraph I effective September 11, 2015; see also paragraph I set out above.]

I. No agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.

[Paragraph II effective until September 11, 2015; see also paragraph II set out below.]

II. Rules shall be valid and binding on persons they affect, and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

[Paragraph II effective September 11, 2015; see also paragraph II set out above.]

II. Rules shall be valid and binding on persons they affect, and shall have the force of law unless they have expired or have been amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

III. An agency shall not by rule:

(a) Provide for penalties or fines unless specifically authorized by statute.

(b) Require licensing, as defined in RSA 541-A:1, IX, unless authorized by a law which uses one of the specific terms listed in RSA 541-A:1, VIII.

(c) Require fees unless specifically authorized by a statute enforced or administered by an agency. Specific authorization shall not include the designation of agency fee income in the operating budget when no other statutory authorization exists.

(d) Provide for non-consensual inspections of private property, unless the statute enforced or administered by the agency specifically grants inspection authority.

(e) Delegate its rulemaking authority to anyone other than the agency named in the statute delegating

authority.

(f) Adopt rules under another agency's authority.

(g) Expand or limit a statutory definition affecting the scope of who may practice a profession.

(h) Require a submission of a social security number unless mandated by state or federal law.

IV. No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

Source. 1994, 412:1. 2003, 309:2, eff. July 1, 2004. 2015, 234:8, eff. Sept. 11, 2015.

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Env-Hw 515.08 Expired Hazardous Waste Coordinator Certification. A hazardous waste coordinator whose certification has expired shall not be eligible for issuance of a renewal certification pursuant to Env-Hw 515.07. A hazardous waste coordinator who wishes to be re-certified shall apply for issuance of an initial certification in accordance with Env-Hw 515.04 and Env-Hw 515.06.

Source. #10494, eff 1-1-14

Env-Hw 515.09 Suspension, Revocation, or Refusal to Renew Certification.

(a) If the department receives information which indicates that good cause, as defined in (d), below, exists to suspend or revoke the certification, the department shall proceed in accordance with the provisions of RSA 541-A, applicable to adjudicative proceedings, and Env-C 209.

(b) After proceeding in accordance with (a), above, the department shall:

- (1) Revoke the certificate if it determines that the reason that good cause exists cannot be corrected to conform to applicable requirements and revoking the certificate will provide greater protection to public health and safety than renewing the certificate; or
- (2) Suspend the certificate, subject to (d), below, if it determines that the reason that good cause exists can be corrected to conform to applicable requirements.

(c) If certification is suspended pursuant to (b)(2), above, the department shall not reinstate certification until:

- (1) The underlying problem identified in (a), above, has been corrected; and
- (2) The certification holder submits either a written request to the department requesting that certification be reinstated or, if the suspended certification has also expired, an application for initial certification pursuant to Env-Hw 515.04.

(d) Good cause to suspend, revoke, or refuse to renew a hazardous waste coordinator certification shall include the following:

- (1) The certified hazardous waste coordinator obtained or attempted to obtain certification through fraud, deceit, or falsification;
- (2) The certified hazardous waste coordinator knowingly violated the hazardous waste rules, conditions of a hazardous waste permit, or other rules or permits related to protection of the environment; or
- (3) Any grounds set forth in Env-C 209.03.

Source. #10494, eff 1-1-14

NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL
Chapter 4 Rule Numbering and Drafting

- Do use **one term** in the rules and define that term instead of using several terms to mean the same thing, unless quoting a definition in a statute or federal regulation. To clarify the term defined, the definition may specify examples of the term, or synonyms in use by the public or regulated community, as in the example to the right; so long as **the term defined is the term used in the substantive rules.**

DON'T SAY:

Abc 102.14 "Property owner" or "Landowner" means the record owner of the parcel of land or structures, or both, where a facility is or is proposed to be located.

SAY:

Abc 102.14 "Property owner" means the record owner of the parcel of land or structures, or both, where a facility is or is proposed to be located. The term includes "landowner."

As noted above, you may include a statutory definition, or a definition in a federal regulation enforced by your agency, as a rule definition. Cite the statute or regulation or quote it verbatim as in the example below, but with the following limitations and exceptions:

Citing the statute:

Abc 101.01 "Asbestos" means "asbestos" as defined in RSA 141-E:2.

Quoting the statute verbatim:

Abc 101.01 "Asbestos" means "asbestos" as defined in RSA 141-E:2, namely "amosite, chrysolite, crocidolite, or asbestiform tremolite, actinolite, or anthophyllite."

- The statute or regulation must be cited specifically;
- The definition must be prefaced with the word "namely" and enclosed within quotation marks; and
- The quotation must be used in its entirety.

WHERE TO PLACE THE DEFINITION

Once a definition is drafted, number and place it as follows:

- If a word appears in the rule more than once, then define it in the beginning of the relevant chapter, part, section, or paragraph. For definitions that apply to the entire title or subtitle, place them in the Chapter 100 organizational rules, as described in 3.5;
- If a word is used only once in the body of an agency's rules, then define it in context, not in the subdivision of the rules used for definitions; and
- If definitions are grouped together, then arrange them in alphabetical order and number them accordingly.

3.8 How to Include Criteria for Discretionary Decisions.

Discretionary decisions by an agency involve situations where the legislature has granted authority by statute to an agency to act, and the agency must apply its judgment on a case-by-case basis—such as to approve or deny a permit, to continue or suspend or revoke a license, or to grant or deny a waiver. Through rulemaking the agency must "implement, interpret, or make specific" that statute.

NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL
Chapter 4 Rule Numbering and Drafting

MAKING SURE YOUR ACTIONS ARE VALID AND ENFORCEABLE

To avoid being arbitrary in your decision, some requirements (in the form of criteria) must be met by the public or considered by your agency for the decision to be made one way or the other. Since these criteria meet the definition of a "rule," then they will have to be proposed and adopted as rules. Otherwise your agency will not be specific and might fall inadvertently into the "oral rulemaking" trap. See 2.2.

Even if it is impossible to foresee all the particular criteria that will govern your agency's discretion for every conceivable situation, you can still avoid oral rulemaking by determining what overall theme or goal governs your agency's decision-making process. You have to give both your agency personnel who must make the decision and the public who must comply a good idea of what you are requiring.

To "implement, interpret, or make specific" your agency's discretionary authority in a rule, choose one of the following 2 formats, with the option of a concluding or "catch-all" phrase:

- There are preconditions that must exist or be met for your agency to make its decision.

As in the example below, **use the word "shall"**, state what shall happen if the specified criteria that trigger the decision exist or are met, and insert the criteria.

Abc 408.06 Mooring Lights.

(a) The licensee shall light the corners or perimeter of a mooring field containing fewer than 10 moorings if the board determines that:

- (1) The moorings are situated in the path of boating traffic;
- (2) The mooring is in a shallow or rocky area;
- (3) A public launch site is within 100 feet of the mooring field perimeter; or
- (4) Any other condition exists in the mooring location which poses a hazard to navigation.

NOTE THESE ELEMENTS:

←The discretionary requirement indicated by "shall light...if."

←Specific criteria in subparagraphs (1) through (3) the agency shall apply to reach the discretionary decision indicated by the words "the board determines."

←The optional "catch-all" clear enough to establish a theme or limiting criterion so that the reader is put on notice that other criteria within this theme or limitation could be considered.

- There is a single criterion or goal that must be met for your agency to make its decision after considering certain factors.

As in the example below, **use the word "shall"** and state what shall happen if the agency finds that the criterion or goal has been met after considering the specified factors.

NEW HAMPSHIRE DRAFTING AND PROCEDURE MANUAL
Chapter 4 Rule Numbering and Drafting

Abc 408.06 Mooring Lights.

(a) The licensee shall light the corners or perimeter of a mooring field containing fewer than 10 moorings if the board determines, after considering the following factors, that the mooring field will be a hazard to navigation:

- (1) The moorings are situated in the path of boating traffic;
- (2) The mooring is in a shallow or rocky area;
- (3) A public launch site is within 100 feet of the mooring field perimeter; and
- (4) Any other factor exists which negatively impacts public boating safety due to the location of the mooring field.

NOTE THESE ELEMENTS:

←The discretionary requirement indicated by “shall light...if.”

←The criterion—“will be a hazard to navigation”—to be met.

←The factors as in subparagraphs (1), (2), and (3) so that it is clear how the agency shall apply them in deciding if the overall criterion or goal has been met.

←The optional “catch-all” phrase as in subparagraph (4) to establish a theme set by the factors so the reader is put on notice that other factors within this theme might be considered.

NOTE:

Don't use a “catch-all” phrase with the words “shall include, but not be limited to” when introducing the factors as in paragraph (a) in the example above. This implies that even the “catch-all” phrase is not broad enough and that rules might be added orally.

3.9 Use of Parentheses in Rules.

Use parentheses in rules only in the following 5 instances:

- Rule numbering pursuant to Part 1;
- Enclosing acronyms or initials when they are first used after the word spelled out, such as “intermediate care facility (ICF)”;
- Pairing Latin scientific terms with their English equivalent, such as “*Ammophila breviligulata* (American beach grass)” or “American beach grass (*Ammophila breviligulata*)” and the Latin in italics or underlined;
- Indicating that both the singular and plural of a word is intended, such as “year(s)”;
- Indicating publication dates, editions, access and print dates, or website directions when citing and incorporating by reference documents or Internet content pursuant to 3.12 and 4.7.

State of New Hampshire
Site Evaluation Committee

ATM
12/1



Martin P. Honigberg, Esquire
Chairman

Thomas S. Burack, Esquire
Vice-Chair

Pamela G. Monroe
SEC Administrator

<http://www.nhsec.nh.gov>
21 South Fruit St., Suite 10
Concord, New Hampshire
03301-2429
Telephone (603) 271-2435
Fax (603) 271-3878

NOV 25 2015

November 25, 2015

Rep. Carol M. McGuire, Chair
Joint Legislative Committee on Administrative Rules
State House Annex, Room 219
25 Capitol Street
Concord, NH 03301-6312

Preliminary OBJECTION
RESPONSE FP 2015-11

*Substantive comments (see attached)
relate to rules on
p. 6, 8, 9, & 12*

**Re: Response to Preliminary Objection to FP 2015-11 and FP 2015-12
Site 100 and Site 201-204 - Organizational Rules and Rules of
Practice and Procedure of the Site Evaluation Committee
Site 205 and 300 - Explanation of Proposed Rule and Certificates
of Site and Facility Rules of the Site Evaluation Committee
SEC Docket No. 2014-04**

Dear Chair McGuire:

I write to you as Chairman of the Site Evaluation Committee (SEC) in response to the preliminary objection issued by the Joint Legislative Committee on Administrative Rules (Committee) to Final Proposals 2015-11 and 2015-12 regarding the SEC's Site 100-300 rules. The preliminary objection was entered on October 15, 2015, by vote of the Committee, pursuant to RSA 541-A:13, IV, based on the grounds as outlined in the Committee staff annotations to the final proposals, on the written testimony provided to the Committee prior to its meeting, on oral and written public testimony provided by the public at the Committee's meeting, and on the Committee's concerns as reflected by its comments at the meeting.

In order to address the Committee's preliminary objection, SEC Staff held a technical session with interested stakeholders on October 28, 2015, to seek resolution of the two primary bases of objections raised by public submissions and identified by the Committee: (1) the "public interest" siting criteria set forth in Site 301.16, and (2) the "cumulative impacts" analysis requirement set forth in Site 301.14(g). The technical session did not result in a consensus position regarding resolution of these two issues.

The SEC met on November 18, 2015, to consider the preliminary objection, and to develop and then approve the substance of this response to the preliminary objection. At that meeting, the SEC also established the text of rules language changes to be submitted in connection with its response and, as described below, authorized its Chairman to request revised objections at the relevant Committee meeting in order to avoid a final objection and/or joint resolution with respect to a number of issues covered by the preliminary objection.

The rules language changes approved by the SEC at its November 18 meeting, including a number of substantive revisions and certain editorial revisions, are incorporated in the annotated versions of the Site 100-204 rules and the Site 205-300 rules submitted herewith. Also attached are revised versions of Appendix A and Appendix B which address comments made by Committee staff counsel.

The following addresses in greater detail specific issues covered by the preliminary objection and the SEC's response to such issues:

Public Interest Criteria

The preliminary objection incorporated comments submitted by Northern Pass Transmission, the New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the public interest siting criteria in Site 301.16 in the Final Proposal were inconsistent with the legislature's intent based on the legislative history of Senate Bill 245 of 2014 (SB 245). Northern Pass also claimed that the public interest criteria were inconsistent with the other siting standards under RSA 162-H:16, IV.

EDP Renewables asserted that the public interest siting criteria were objectionable because they required consideration of a facility's consistency with local plans and policies and with municipal master plans and land use regulations. EDP Renewables also challenged the inclusion of a reference in the criteria to the state energy policy as contrary to legislative intent, based on the 2009 repeal of a requirement that the SEC determine that a proposed facility is consistent with this policy.

Joe Lukeman claimed that the public interest criteria were objectionable because they do not differentiate between essential and elective energy projects, and because they do not fully consider the economy of a town or the impact on a town's master plan.

In response to the preliminary objection, the SEC has revised the provisions of Site 301.16 to remove the language that was subject to the objections based on legislative intent and instead to require the SEC to consider a list of values and factors that is taken directly from the purpose section of the statute, RSA 162-H:1. The SEC also expressly authorized its Chairman to request that the Committee issue a revised objection if it appears that the Committee would find the revised language to be objectionable. Such a revised objection request could be either to restore the language included in the final proposal or to entirely remove Site 301.16 and not include any specific public interest siting criteria, as determined in the discretion of the Chairman during the Committee meeting.

The SEC approved these actions in response to the preliminary objection without finding that the public interest criteria set forth in the final proposal were inconsistent with the intent of the legislature in adopting the SB 245 amendments to RSA 162-H. The legislative history of SB 245, while perhaps not completely clear on this point, does not compel the conclusion that the final proposal criteria violate this legislative intent.

We note further that SB 245, in addition to requiring that the SEC find that issuance of a certificate “will serve the public interest,” also amended RSA 162-H:16, IV to include the following sentence (emphasis added):

After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.

SB 245 also amended the SEC rulemaking mandate in RSA 162-H:10, VII to require that the SEC adopt rules relative to the criteria for siting energy facilities, “including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility.” Notably, this amendment *broadened* the scope of the rulemaking directive to adopt specific criteria to encompass *all* of RSA 162-H:16, IV, including the “public interest” finding under subsection (e) and the sentence quoted above, while the prior language of this section had referenced only subsections (b) and (c) of RSA 162-H:16, IV.

This appears to be strong evidence of the legislature’s intent that the SEC adopt specific criteria regarding the required “public interest” finding and the determination called for under the quoted sentence. The SEC did so through its adoption of the final proposal language of Site 301.16 and, in response to the preliminary objection, it has now revised the language of this section to more explicitly cover the values and factors referenced in the statutory purpose section, RSA 162-H:1. We believe this revision has removed any potential basis for objection to the public interest siting criteria set forth in Site 301.16.

Cumulative Impacts Analysis

The preliminary objection incorporated comments submitted by Northern Pass Transmission, New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the requirement set forth in Site 301.14(g) that the SEC analyze the “cumulative impacts” of all energy facilities on public health and safety, natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including aesthetic impacts and sound impacts, was inconsistent with legislative intent. Their assertion is based on the removal during the SB 245 legislative process of language that would have applied a cumulative impacts analysis to all energy facilities, as well as the inclusion through other legislative enactments of specific references to a cumulative impacts analysis for wind energy systems (RSA 162-H:10-a) and natural gas pipelines (RSA 162-H:10-b). Northern Pass also claimed that the required cumulative impacts analysis, as applied to non-wind energy facilities, was inconsistent with the other siting standards under RSA 162-H:16, IV.

The SEC was advised during its November 18 meeting that there may be a stronger basis to question whether the broader cumulative impacts analysis requirement is consistent with the legislature’s intent, in view of this legislative history and principles of statutory construction. The SEC decided to revise the language of Site 102.18, Site 301.03(h)(6), and Site 301.14(g), such that those rules

provisions regarding cumulative impacts would apply only to wind energy facilities and not to other types of energy facilities. We believe this revision has removed any potential basis for objection to the provisions of Site 301.14(g).

Municipal Preemption Impermissible

The preliminary objection incorporated comments submitted by the Towns of Easton, Littleton, Sugar Hill, Bethlehem, and Monroe, Executive Councilor Joe Kenney, and several other individuals, asserting that municipal master plans and other local land use regulations, plans and policies should not be preempted through the SEC's energy facility certificate process.

We would note as an initial matter that the final proposal does not include a rule that could fairly be characterized as one calling for preemption of municipal regulation. During the course of the rulemaking process, many individuals and entities proposed rules that would require projects subject to the SEC's jurisdiction to comply with local ordinances. The SEC declined to adopt any of those proposals.

Substantively, the SEC does not believe any change to the rules is appropriate regarding this issue. Under the New Hampshire Supreme Court precedent in *PSNH v. Town of Hampton*, 120 N.H. 68 (1980), it is clear that municipal planning and zoning are preempted by the pervasive state siting process implemented by the SEC. Since that judicial decision was issued, the legislature has not amended the statute in any way that affects this conclusion. The SEC therefore has made no revision to the proposed rules in response to these comments.

Municipal Veto Impermissible

The preliminary objection incorporated comments submitted by New England Ratepayers Association and EDP Renewables, asserting that the requirements for applicants to submit and the SEC to consider the municipal master plans and local zoning ordinances of certain host and affected communities are arguably irrelevant to the SEC process because of state preemption under the *Town of Hampton* case cited above. EDP Renewables argued that this requirement under Site 301.09 is beyond the SEC's authority.

These comments effectively present a "mirror image" of the municipal preemption issue addressed in the preceding section above. The SEC was advised that the proposed rules merely require filing of municipal master plans and zoning ordinances as written evidence of municipal views on relevant issues as permitted by statute. These are only factors to be considered by the SEC and are subject to SEC preemption under the Supreme Court precedent as noted above. The SEC therefore has made no revision to the proposed rules in response to these comments.

Transmission Setbacks Specific Criteria

The preliminary objection incorporated comments submitted by Pamela Martin, Kris Pastoriza, and a number of other individuals, asserting that the proposed SEC rules amendments should include

specific setback restrictions for electric transmission projects, and that the failure to do so is inconsistent with the SEC rulemaking directive under RSA 162-H:10, VII.

Through the public rulemaking process, the SEC was persuaded that specific setback distances would not be appropriate in all situations, so it would be preferable to permit specification of applicable setbacks and safety zones on an individualized, case-by-case basis, based on the record as developed for each application. The SEC believes that conclusion represents a policy determination made by the SEC and is not a proper ground for objection before the Committee. The SEC therefore has made no revision to the proposed rules in response to these comments.

Site Control and Eminent Domain

The preliminary objection incorporated testimony and comments presented by Senator Jeannie Forrester and by Dorothy McPhaul, effectively asserting that the SEC should not provide or recognize the exercise of eminent domain by applicants to secure site or route control. As stated by the SEC Chairman during the Committee's October 15th meeting and reiterated at the SEC's November 18th meeting, the SEC has no authority to grant eminent domain rights to an applicant or to any other party.

The site control requirements of proposed Site 301.03(c)(6) contain a narrow exception for applicants that can demonstrate they have taken action that may lead to eminent domain authority under a *separate* source of law, such as FERC interstate natural gas pipeline certification. Those applicants may submit an application to the SEC if they have initiated a federal regulatory proceeding or taken other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the proposed facility thereon. The SEC concluded that the related testimony and comments do not form a basis for objection, and therefore the SEC has made no revision to the proposed rules in response to these comments.

Decommissioning Plans for Energy Facilities

The preliminary objection incorporated comments submitted by Dorothy McPhaul and by EDP Renewables with respect to the decommissioning plan requirements set forth in Site 301.08(a)(7) and (c)(2). Ms. McPhaul argued that the rules should not permit applicants to provide decommissioning plan financial assurance in the form of corporate guaranties, and that the removal of structures and site restoration should be required for all energy facilities and not only for wind energy systems.

EDP Renewables argued that the express exclusion of potential salvage value when determining the required amount of decommissioning plan funding is inconsistent with legislative intent, because such exclusion was included in a prior version of the legislation which was eventually enacted through House Bill 1602 of 2014, but was removed prior to enactment. EDP Renewables also asserted that the listed forms of financial assurance are financially onerous and are not required by statute.

The SEC determined that the specific financial assurance requirements for energy facility decommissioning plans are policy decisions that it made after consideration of extensive and detailed comments submitted through the public rulemaking process. With respect to the exclusion of salvage

value from decommissioning plan funding amount calculations, the SEC concluded that this was not contrary to legislative intent but also falls within the purview of its policymaking authority. The SEC therefore has made no revision to the proposed rules in response to these comments.

EDP Renewables' Other Objections

The preliminary objection incorporated additional comments submitted by EDP Renewables, a developer and operator of wind energy facilities, objecting to the following proposed SEC rules provisions:

- (1) the eight-hour annual shadow flicker limit under Site 301.14(f)(2)b;
- (2) the inclusion of energy facilities for which the SEC has accepted an application in the definition of "cumulative impacts" under Site 102.18;
- (3) the requirement that wind energy facility applicants submit photosimulations from a sample of private property observation points, to the extent feasible, under Site 301.05(b)(7); and
- (4) the requirement that applicants provide notice of initial public information sessions to abutting property owners by certified mail, under Site 201.01(b).

The SEC determined that the specified shadow flicker hour limit, the inclusion of accepted applications in the "cumulative impacts" definition, and the requirement for submission of photosimulations from a sample of private property observation points, are all policy decisions squarely within the SEC's rulemaking authority that were made after consideration of comments submitted through the public rulemaking process. The SEC further determined that the requirement that abutting property owners be given notice of initial public information sessions by certified mail is not inconsistent with the statutory notice provisions under RSA 162-H:10, I. The SEC therefore has made no revisions to the proposed rules in response to these additional comments of EDP Renewables.

Committee Staff Issues

The preliminary objection included the grounds as outlined in Committee staff annotations to the SEC's final proposals. A number of those issues have been resolved by the SEC in rules language revisions incorporated in the attached annotated rules documents. Other such issues were addressed by the SEC as follows:

"Scenic quality" definition (Site 102.44). Committee staff commented that this definition is overly subjective, and that it includes substantive aspects and so should be moved to the Site 300 rules. The SEC determined that the concept of aesthetic significance embodied in this definition is to a great extent inherently subjective and does not lend itself to more definitive explication. The SEC also noted that this term is referenced in a number of other definitions in Site 102, and so should remain in this section of the proposed rules. The SEC therefore has made no revisions to the proposed rules in response to

these comments.

Subcommittee formation (Site 103.03(a) and (d)). Committee staff commented that these proposed rules provisions should specify the circumstances and criteria for formation of subcommittees. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

State agency member designation of senior staff person (Site 103.03(d)(1)). Committee staff commented that this proposed rules provision should specify the circumstances and criteria for designation by state agency SEC members of senior staff to serve in their stead. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

SEC public hearing in county or counties (Site 201.03(a) and (b)). Committee staff commented that the procedures for the SEC's non-adjudicative public hearings in the energy facility host county or counties should be specified, as in the NHDES Env-C 205 rules. The SEC noted that the proposed rules language tracks the relevant statutory provisions and that the NHDES rules seem inapposite. The SEC, however, did approve additions to Site 201.03 regarding public comments, transcripts, and website posting of information submitted in connection with its public hearings held in the county or counties.

Additional information sessions (Site 201.04). Committee staff commented that this proposed rules provision should specify the factors to be considered by the SEC when determining if any additional sessions are reasonable. The SEC noted that the proposed rules language tracks and cites the relevant statutory provision. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

Conditions of certificate (Site 301.17). Committee staff commented that this proposed rules provision should specify under what circumstances the enumerated potential certificate conditions will be imposed, and what factors and criteria will be assessed when making these decisions. The SEC has addressed this comment by adding the phrase "in order to meet the purposes of RSA 162-H" to the introductory language in Site 301.17.

Access to facility site for inspection and monitoring (Site 302.01(b)). Committee staff commented that this proposed rules provision may violate the Fourth Amendment to the United States Constitution if no pre-compliance review is provided for prior to an agency search of business premises, citing the June 2015 decision of the Supreme Court of the United States in *City of Los Angeles v. Patel*. The SEC has addressed this comment through revision of this subsection in the proposed rules.

Suspension of certificate by SEC (Site 302.01(f) and 302.02(d)). Committee staff commented regarding the use of “may” rather than “shall” in these proposed rules provisions, and indicated that the SEC should specify the basis on which it might *not* suspend a certificate following a violation or misrepresentation. The SEC noted that these proposed rules track and cite the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

Based on this response and the related rules language revisions shown in the enclosed documents, the SEC believes that the Committee’s preliminary objection has been fully addressed and resolved, and that no further basis exists for objection to the proposed Site 100-300 rules amendments. The SEC respectfully requests that the Committee approve the revised rules submitted with this response without further amendment or objection.

Thank you for your attention to this matter.

Sincerely,



Martin P. Honigberg
Chairman

Enclosures
cc: Service List

Readopt with amendments Site 100, effective 6-17-08 (Document #9182), to read as follows:

CHAPTER Site 100 ORGANIZATIONAL RULES

PART Site 101 PURPOSE AND APPLICABILITY

Site 101.01 Purpose. The purpose of the rules of the site evaluation committee is to:

(a) Describe the requirements and procedures of the site evaluation committee in reviewing and acting upon applications to construct energy facilities, requests for modification of facilities, determinations of jurisdiction and exemption, and similar or related business before the committee or any designated subcommittee; and

(b) Describe the organization of the site evaluation committee and any designated subcommittee.

Site 101.02 Applicability. The rules of the site evaluation committee shall apply to:

(a) Any person who constructs or operates, or proposes to construct or operate an energy facility in New Hampshire;

(b) Any person who participates in public information sessions scheduled by the applicant or adjudicative or informational public hearings conducted by the committee, or a designated subcommittee, concerning an energy facility; and

(c) Any person or organization appearing as a party, an intervenor, or a public commenter before the committee or any designated subcommittee.

PART Site 102 DEFINITIONS

Site 102.01 “Abutting property” means any property that is contiguous to or directly across a road, railroad, or stream from property on, under or above which an energy facility is located or proposed to be located.

Site 102.02 “Acceptance” means “acceptance” as defined in RSA 162-H:2, I, namely, “a determination by the committee that it finds that an application is complete and ready for consideration.”

Site 102.03 “Adaptive management” means a system of management practices based on specified desired outcomes, monitoring to determine if management actions are meeting the desired outcomes, and, if not, provisions for management changes designed to ensure that the desired outcomes are met or are re-evaluated.

Site 102.04 “Adjudicative hearing” means a public hearing held by the committee in an adjudicative proceeding.

Site 102.05 “Adjudicative proceeding” means “adjudicative proceeding” as defined in RSA 541-A:1, I, namely, “the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.”

Site 102.06 “Administrator” means “administrator” as defined in RSA 162-H:2, I-a, namely, “the administrator of the committee,” as established by RSA 162-H.

Site 102.07 “Affected Communities” means the proposed energy facility host municipalities and unincorporated places, municipalities and unincorporated places abutting the host municipalities and

unincorporated places, and other municipalities and unincorporated places that are expected to be affected by the proposed facility, as indicated in studies included with the application submitted with respect to the proposed facility.

Site 102.08 “Applicant” means any person seeking to construct and operate any energy facility within this state.

Site 102.09 “Application” means the written document filed with the committee seeking the issuance of a Certificate of Site and Facility.

Site 102.10 “Area of potential visual impact” means a geographic area from which a proposed facility would be visible, and would result in potential visual impacts, subject to the areal limitations specified in Site 301.05(b)(4).

Site 102.11 “Astronomical maximum” means the theoretical maximum number of hours that shadow flicker will be produced at a location assuming the sun is shining all day from sunrise to sunset, the rotor-plane of the turbine is always perpendicular to the sun, and the turbine is always operating.

Site 102.12 “Best practical measures” means available, effective, and economically feasible on-site or off-site methods or technologies used during siting, design, construction, and operation of an energy facility that effectively avoid, minimize, or mitigate relevant impacts.

Site 102.13 “Certificate” or “certificate of site and facility” means “certificate” or “certificate of site and facility” as defined in RSA 162-H:2, II-a, namely “the document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility.” “Certificate” includes the document issued by a subcommittee, containing such conditions as the subcommittee deems appropriate, that authorizes the applicant to proceed with the proposed renewable energy facility.

Site 102.14. “Combined observation” means a viewer sees multiple energy facilities from a stationary point within a typical cone of vision.

Site 102.15 “Commission” means the New Hampshire public utilities commission.

Site 102.16 “Committee” means the site evaluation committee established under RSA 162-H.

Site 102.17 “Critical wildlife habitat” means, for a federally listed threatened or endangered species:

(a) The designated and mapped specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Endangered Species Act, 16 U.S.C. §1533, on which are found those physical or biological features:

(1) Essential to the conservation of the species; and

(2) Which can require special management considerations or protection; and

(b) Specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Endangered Species Act, 16 U.S.C. § 1533, upon a determination by the Secretary of the United States Department of the Interior that such areas are essential for the conservation of the species.

Site 102.18 “Cumulative impacts” means the totality of effects resulting from at the proposed wind energy facility, all existing wind energy facilities, all wind energy facilities for which a certificate of site and facility has been granted, and all proposed wind energy facilities for which an application has been accepted.

Site 102.19 “Energy facility” means “energy facility” as defined in RSA 162-H:2, VII, namely

(a) any industrial structure that may be used substantially to extract, produce, manufacture, transport or refine sources of energy, including ancillary facilities as may be used or useful in transporting, storing or otherwise providing for the raw materials or products of any such industrial structure. This shall include but not be limited to industrial structures such as oil refineries, gas plants, equipment and associated facilities designed to use any, or a combination of, natural gas, propane gas and liquefied natural gas, which store on site a quantity to provide 7 days of continuous operation at a rate equivalent to the energy requirements of a 30 megawatt electric generating station and its associated facilities, plants for coal conversion, onshore and offshore loading and unloading facilities for energy sources and energy transmission pipelines that are not considered part of a local distribution network.

(b) electric generating station equipment and associated facilities designed for, or capable of, operation at any capacity of 30 megawatts or more.

(c) an electric transmission line of design rating of 100 kilovolts or more, associated with a generating facility under subparagraph (b), over a route not already occupied by a transmission line or lines.

(d) an electric transmission line of a design rating in excess of 100 kilovolts that is in excess of 10 miles in length, over a route not already occupied by a transmission line.

(e) a new electric transmission line of design rating in excess of 200 kilovolts.

(f) a renewable energy facility.

(g) any other facility and associated equipment that the committee determines requires a certificate, consistent with the findings and purposes of 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.”

Site 102.20 “Energy transmission pipeline” means a pipeline used to transport natural gas, oil, or other source of energy.

Site 102.21 “Exemplary natural community” means “exemplary natural community” as defined in RSA 217-A:3, VII, namely, “a viable occurrence of a rare natural community type or a high quality example of a more common natural community type as designated by the natural heritage bureau based on community size, ecological condition, and landscape context.”

Site 102.22 “Fragmentation” means the loss of habitat that results from the division of relatively large, continuous habitats into smaller, more isolated remnants.

Site 102.23 “Historic sites” means “historic property,” as defined in ~~36 C.F.R. §800.16(l)(1) and RSA 227-C:1, VI, namely “any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation.” The term and may includes rural, designed, traditional and natural landscapes~~ “any prehistoric or historic district, site,

building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior,” pursuant to 36 C.F.R. §800.16(I)(1).

Site 102.24 “Investment grade credit rating” means a current rating for senior unsubordinated debt of AAA, AA, A, or BBB, as issued by Standard and Poor’s Corporation, or Aaa, Aa, A, or Baa, as issued by Moody’s Investors Service, Inc.

Site 102.25 “Key observation point” means a viewpoint that receives regular public use and from which the proposed facility would be prominently visible.

Site 102.26 “Landscape” means the characteristic, visible features of an area including landforms, water forms, vegetation, historic and cultural features and all other objects and aspects of natural and human origin.

Site 102.27 “Migration corridors” means routes travelled by fish or wildlife when travelling between seasonal habitats that are necessary to maintain sustainable fish and wildlife populations.

Site 102.28 “Motion” means a request made to the committee or the presiding officer after the commencement of a contested proceeding for an order or ruling directing some act to be done in favor of the party making the motion, including a statement of justification or reasons for the request.

Site 102.29 “Natural community” means “natural community” as defined in RSA 217-A:3, XI, namely, “a recurring assemblage of plants and animals found in a particular physical environment.”

Site 102.30 “Natural heritage bureau” means the natural heritage bureau administered within the division of forests and lands of the department of resources and economic development.

Site 102.31 “Party” means “party” as defined by RSA 541-A:1, XII, namely, “each person or agency named or admitted as a party, or properly seeking and entitled as a right to be admitted as a party.” The term “party” includes all intervenors in a proceeding, subject to any limitations established pursuant to RSA 541-A:32, III.

Site 102.32 “Person” means “person” as defined by RSA 162-H:2, IX, namely, “any individual, group, firm, partnership, corporation, cooperative, municipality, political subdivision, government agency or other organization.”

Site 102.33 “Petition” means:

(a) A request to the committee to rule on the applicability of this chapter to a particular proposed energy facility;

(b) A petition for intervention made pursuant to RSA 541-A:32; or

(c) Any other initial filing that requests the committee to take action with respect to a matter within its jurisdiction or to determine whether it has jurisdiction over a matter.

Site 102.34 “Petitioner” means

(a) For a petition as defined in Site 102.33(a), “petitioner” as defined in RSA 162-H:2, XI, namely, “a person filing a petition meeting any of the following conditions:

(a) A petition endorsed by 100 or more registered voters in the host community or host communities;

- (b) A petition endorsed by 100 or more registered voters from abutting communities;
- (c) A petition endorsed by the governing body of a host community or 2 or more governing bodies of abutting communities; or
- (d) A petition filed by the potential applicant;”

(b) For a petition as defined in Site 102.33(b), a person who files a petition for intervention pursuant to RSA 541-A:32; or

(c) For a petition as defined in Site 102.33(c), a person who files the petition with the committee.

Site 102.35 “Photosimulations” means computer-enhanced images generated using professionally accepted software that illustrate the visible effects anticipated from a proposed facility.

Site 102.36 “Presiding officer” means “presiding officer” as defined in RSA 541-A:1, XIV, namely, “that individual to whom the agency has delegated the authority to preside over a proceeding, if any; otherwise, it shall mean the head of the agency.”

Site 102.37 “Proof by a preponderance of the evidence” means that what is sought to be proved is determined to be more probable than not.

Site 102.38 “Public information hearing” means a hearing scheduled pursuant to RSA 162-H:10, I-c where the applicant presents information to the committee and other agencies that have permitting or other regulatory authority over the subject matter and to the public about the proposed facility.

Site 102.39 “Public information session” means a public meeting held before or after the filing of an application at which the applicant presents information to the public regarding the proposed facility, as provided for in RSA 162-H:10, I and I-a.

Site 102.40 “Rare natural community” means a natural community ranked by the natural heritage bureau as S1 (critically imperiled), S2 (imperiled), or S3 (very rare and local).

Site 102.41 “Rare plant” means any species included on the most recent version of the “Rare Plant List for New Hampshire” maintained by the natural heritage bureau.

Site 102.42 “Renewable energy facility” means “renewable energy facility” as defined in RSA 162-H:2, XII, namely, “electric generating station equipment and associated facilities designed for, or capable of, operation at a nameplate capacity of greater than 30 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. “Renewable energy facility” shall also include electric generating station equipment and associated 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.”

Edit: “also includes”.

Site 102.43 “Rural area” means any geographic area in the State of New Hampshire that is not included within an urbanized area or an urban cluster.

See attached comment #8.

Site 102.44 “Scenic quality” means a reasonable person’s perception of the intrinsic beauty of landforms, water features, or vegetation in the landscape, as well as any visible human additions or alterations to the landscape.

Site 102.45 “Scenic resources” means resources to which the public has a legal right of access that are:

(a) Designated pursuant to applicable statutory authority by national, state, or municipal authorities for their scenic quality;

(b) Conservation lands or easement areas that possess a scenic quality;

(c) Lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality;

(d) Recreational trails, parks, or areas established, protected or maintained in whole or in part with public funds;

(e) Historic sites that possess a scenic quality; or

(f) Town and village centers that possess a scenic quality.

Site 102.46 “Sequential observation” means a viewer is capable of seeing multiple energy facilities from different viewpoints as the viewer travels along a particular route such as a trail, river, scenic byway, or on a lake.

Site 102.47 “Service list” means a list maintained by the committee containing the names and addresses of all parties and intervenors in a proceeding and all other interested persons or groups who request to be included on the service list.

Site 102.48 “Shadow flicker” means the alternating changes in light intensity that can occur when the rotating blades of a wind turbine are back-lit by the sun and cast moving shadows on the ground or on structures.

Site 102.49 “Significant habitat resource” means habitat used by a wildlife species for critical life cycle functions.

Site 102.50 “Significant wildlife species” means:

(a) Any species listed as threatened or endangered, or which is a candidate for such listing, by the United States fish and wildlife service; or

(b) Any species listed as threatened, endangered, or of special concern by the New Hampshire department of fish and game.

Site 102.51 “Subcommittee” means any subcommittee established under RSA 162-H:4-a for the purpose of reviewing an application for an energy facility or to exercise any other authority or perform any other duty of the committee, subject to the limitations set forth in RSA 162-H:4-a, I.

Site 102.52 “Successive observation” means a viewer sees multiple energy facilities from a particular viewpoint, but not within the same viewing arc, by changing the viewer’s cone of vision.

Site 102.53 “Urban cluster” means an “urban cluster” as designated by the U.S. Census Bureau.

Site 102.54 “Urbanized area” means an “urbanized area” as designated by the U.S. Census Bureau.

Site 102.55 “Visibility analysis” means a spatial analysis conducted using computer software to determine the potential visibility of a proposed facility.

Site 102.56 “Visual impact assessment” means the process for determining the degree of change in scenic quality resulting from construction of a proposed facility.

Site 102.57 “Wildlife” means “wildlife” as defined in RSA 207:1, XXXV, namely, “all species of mammals, birds, fish, mollusks, crustaceans, amphibians, invertebrates, reptiles or their progeny or eggs which, whether raised in captivity or not, are normally found in a wild state.”

PART Site 103 COMMITTEE DESCRIPTION

Site 103.01 Committee Membership and Responsibilities.

(a) The committee consists of the following 9 persons, except as otherwise provided in (b) below:

- (1) The commissioners of the commission;
- (2) The commissioner of the department of environmental services;
- (3) The commissioner of the department of resources and economic development;
- (4) The commissioner of the department of transportation;
- (5) The commissioner of the department of cultural resources or the director of the division of historical resources as designee; and
- (6) Two members of the public appointed pursuant to RSA 162-H:3, I (f), except in any matter for which an alternate public member is appointed pursuant to RSA 162-H:3, XI.

(b) If at any time a member who is a state employee must recuse himself or herself on a matter, or is not otherwise available for good reason, such member shall designate a senior administrative employee or a staff attorney from his or her agency to sit on the committee.

(c) The committee shall be responsible for the following:

- (1) Evaluation and issuance of any certificate for an energy facility under RSA 162-H and these rules;
- (2) Determination of the terms and conditions of any certificate issued under RSA 162-H and these rules;
- (3) Adjudication and determination of any petition filed under RSA 162-H and these rules;
- (4) Monitoring of the construction and operation of any energy facility issued a certificate under RSA 162-H and these rules to ensure compliance with such certificate;

(5) Enforcement of the terms and conditions of any certificate issued under RSA 162-H and these rules; and

(6) Assistance to the public in understanding the requirements of RSA 162-H and these rules.

Site 103.02 Committee Chairperson and Vice-Chairperson and Authority.

(a) The chairperson of the commission shall be chairperson of the committee.

(b) The commissioner of the department of environmental services shall be the vice-chairperson of the committee.

(c) The chairperson shall serve as the chief executive of the committee and shall have the authority to do the following:

(1) Delegate to other members the duties of presiding officer;

(2) Perform administrative actions for the committee;

(3) Establish the budgetary requirements of the committee, with the consent of the committee;

(4) Hire or engage the administrator and other personnel to provide services to the committee;

(5) In the absence of an administrator, and with approval of the committee, engage independent contractors or additional personnel to provide technical, legal, or administrative support to fulfill the functions of the committee; and

(6) Form subcommittees pursuant to RSA 162-H:4-a and Site 103.03.

Site 103.03 Subcommittee Formation and Authority.

See attached
comment #9.

(a) Pursuant to RSA 162-H:4-a, I, the chairperson may establish a subcommittee to consider and make a decision on an application, including the issuance of a certificate, or to exercise any other authority or perform any other duty of the committee under this chapter, except that no subcommittee shall:

(1) Approve the budgetary requirements of the committee;

(2) Approve any support staff positions paid for through the site evaluation committee fund;

(3) Propose the committee funding plan under RSA 162-H:21; or

(4) Adopt initial or final rulemaking proposals.

(b) For purposes of executing its regulatory functions under RSA 162-H and these rules, a subcommittee shall assume the role of and be considered the committee with all of its associated powers and duties in order to execute the charge given the subcommittee upon its formation.

(c) When considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members, provided that:

(1) The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee;

(2) Pursuant to RSA 162-H:4-a, II, each selected member may designate a senior administrative employee or staff attorney from his or her respective agency to sit in his or her place on the subcommittee; and

See attached comment #9.

(3) The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible.

(d) Pursuant to RSA 162-H:4-a, III, in any matter not covered under (c) above, the chairperson may establish a subcommittee of 3 members, consisting of 2 state agency members and one public member, provided that:

(1) Pursuant to RSA 162-H:4-a, III, each state agency member may designate a senior administrative employee or staff attorney from his or her agency to sit in his or her place on the subcommittee; and

(2) The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible.

(e) Any party whose interests ~~might~~ be affected ~~may~~ shall have the right to object to a matter being assigned to a 3-person subcommittee pursuant to (d) above not less than 14 days before the first hearing before such subcommittee.

(f) If an objection as described in (e) above is received by the committee, the chairperson shall remove the matter from the 3-person subcommittee and either assign it to a subcommittee formed under (c) above or have the full committee decide the matter.

Site 103.04 Committee Administrator and Staff.

(a) Administrative services for the Committee shall be provided by the administrator.

(b) The administrator shall monitor the construction or operation of any energy facility issued a certificate under RSA 162-H and these rules, if and to the extent such monitoring duties are delegated to the administrator pursuant to RSA 162-H:4, III.

(c) The administrator shall specify the use of any technique, methodology, practice, or procedure approved within a certificate, if and to the extent such duty is delegated to the administrator pursuant to RSA 162-H:4, III-a.

(d) The administrator shall specify minor changes in route alignment to the extent that such changes are authorized by a certificate for those portions of a proposed electric transmission line or energy transmission pipeline, for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate, if and to the extent such authority is delegated to the administrator pursuant to RSA 162-H:4, III-a.

(e) The administrator, with committee approval, shall engage additional technical, legal, or administrative support to fulfill the functions of the committee as are deemed necessary, provided that any such person to be hired by the administrator shall be approved by the chairperson.

(f) The chairperson or the administrator shall appoint counsel to conduct all prehearing conferences, if such appointment would promote the orderly conduct of the proceeding.

Site 103.05 Counsel for the Public. Pursuant to RSA 162-H:9, the attorney general shall appoint an assistant attorney general as counsel for the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.

PART Site 104 PUBLIC REQUESTS FOR INFORMATION

Site 104.01 Requests for Committee Public Records.

(a) Requests for access to the public files and records of the committee shall be directed to the administrator, or to the chairperson of the committee if no administrator has been appointed, as follows:

Administrator [Chairperson]
Site Evaluation Committee
c/o New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
Tel. (603) 271-2431
Fax (603) 271-3878
TDD Access Relay N.H. 1-800-735-2964

(b) Any member of the public may request photocopies of minutes and records of the committee in any proceeding or in any other matter before the committee pursuant to (a) above upon a determination by the presiding officer, in the case of a proceeding, or the chairperson, with respect to all other committee matters, that such requested documents are not exempt from disclosure pursuant to RSA 91-A:5.

(c) The committee shall provide the requested documents to the person requesting such documents upon payment of the cost of copying such documents pursuant to (b) above and (d) and (e) below.

(d) Copies shall be free for requests of 10 pages or less.

(e) A charge of \$0.10 per page shall be assessed for every copy over the first 10 pages.

(f) The committee shall post public information on its website at www.nhsec.nh.gov.

Readopt with amendments Site 201 – 204, effective 6-17-08 (Document #9183-A), cited and to read as follows:

CHAPTER Site 200 PRACTICE AND PROCEDURE RULES

PART Site 201 PUBLIC INFORMATION SESSIONS AND HEARINGS

Site 201.01 Public Information Sessions Prior to Application.

(a) Not less than 30 days prior to filing an application for a certificate, the applicant shall hold not less than one public information session in each county in which the proposed facility is to be located, at which session the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held. This notice shall describe the nature and location of the proposed facility. The applicant shall mail a copy of this notice to each of the affected communities by first class mail and to each owner of abutting property by certified mail.

(c) Not less than 10 days before each such session, the applicant shall provide to the chairperson of the committee a copy of the public notice published pursuant to (b) above.

(d) The applicant shall arrange for a transcript of such session to be prepared and shall include the transcript in its application for a certificate.

Site 201.02 Public Information Sessions After Application.

(a) Within 45 days after acceptance of an application for a certificate pursuant to Site 301.10, the applicant shall hold not less than one public information session in each county in which the proposed facility is to be located, at which session the applicant shall present information regarding the proposed energy facility described in the application and provide an opportunity for comments and questions from the public to be addressed by the applicant.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall mail a copy of this notice to each of the affected communities by first class mail.

(c) Not less than 10 days before each such session, the applicant shall provide to the presiding officer of the committee a copy of the public notice published pursuant to (b) above.

(d) The administrator, or a designee of the presiding officer of the committee, shall act as presiding officer of the public information session, and shall explain to the attendees at such session the process to be used by the committee to review the application for the proposed facility.

Site 201.03 Public Hearings in Host Counties.

(a) Within 90 days after acceptance of an application for a certificate pursuant to Site 301.10, the committee shall hold not less than one public hearing in each county in which the proposed facility is to be located.

(b) Each public hearing held under (a) above shall be a joint hearing with representatives of any agencies that have permitting or other regulatory authority over the subject matter, and shall be in lieu of and deemed to satisfy all initial requirements for public hearings under the statutes requiring permits relative to environmental impact applicable to the proposed facility.

(c) Notwithstanding (b) above, if any agency that has permitting or other regulatory authority over the subject matter does not otherwise have authority to conduct hearings, such agency may not join in the public hearing, provided that the ability or inability of any such state agency to join in the public hearing shall not affect the composition of the committee or the ability of any member of the committee to act in accordance with RSA 162-H and these rules.

(d) The committee shall publish a public notice not less than 14 days before each such public hearing in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facility. The committee shall mail a copy of this notice to each of the affected communities by first class mail.

(e) At each such public hearing, members of the public having an interest in the subject matter shall be provided with an opportunity to state their positions.

(f) The committee shall require members of the public desiring to make oral statements at any such public hearing to so indicate by providing their names, town or city of residence, and parties represented on a roster made available for this purpose prior to the commencement of the hearing. Individuals who do not wish to speak in public may submit a statement to be read by a person of their choice.

(g) The committee shall arrange for a transcript of each such public hearing to be prepared and shall post the transcript on its website.

(h) The committee shall post on its website all written documents submitted in connection with any such public hearing, including those submitted by members of the public.

Site 201.04 Additional Information Sessions. Pursuant to RSA 162-H:10, I-b, upon request of the governing body of a municipality or unincorporated place in which the proposed energy facility is to be located, or on the committee's own motion, the committee may order the applicant to provide such additional public information sessions as are reasonable to inform the public regarding the proposed energy facility. At each such additional public information session, the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant.

See attached comment #10.

PART Site 202 ADJUDICATIVE PROCEEDINGS

Site 202.01 Adjudicative Hearing. Except for petitions to intervene, which shall be governed by Site 202.11, the committee shall conduct an adjudicative proceeding regarding an application or petition, or when determining whether to suspend or revoke a certificate, in accordance with the administrative procedure act, RSA 541-A, and these rules.

Site 202.02 Presiding Officer and Hearing Officer.

(a) The chairperson of the committee shall preside over adjudicative hearings conducted before the full committee or shall designate the vice-chairperson or another member as presiding officer for such proceedings. In the case of any adjudicative proceeding to be conducted before a subcommittee, the

chairperson shall designate one member or designee to be the presiding officer, who shall be an attorney whenever possible.

(b) In the absence of the designated presiding officer, the members of the committee or subcommittee, as applicable, who are present shall select by majority vote a member of such committee or subcommittee to serve as presiding officer.

(c) In adjudicative proceedings, the presiding officer shall:

- (1) Facilitate informal resolution of contested issues;
- (2) Conduct any hearing in a fair, impartial and efficient manner;
- (3) Decide any disputed petitions for intervention;
- (4) Admit relevant evidence and exclude irrelevant, immaterial or unduly repetitious evidence;
- (5) Provide opportunities for the parties and committee members to question any witness;
- (6) Receive public statements; and
- (7) Cause a complete record of any hearing to be made.

(d) In any matter before the committee or any subcommittee, the presiding officer, or a hearing officer designated by the presiding officer, shall hear and decide procedural matters that are before the committee, including the following:

- (1) Procedural schedules for proceedings;
- (2) Discovery schedules for proceedings;
- (3) Discovery motions in proceedings;
- (4) Consolidation of parties having substantially similar interests;
- (5) Decisions on undisputed petitions for intervention; and
- (6) Identification of significant disputed issues for hearing and decision by the committee.

Site 202.03 Withdrawal of Committee or Subcommittee Member.

(a) Upon his or her own initiative, or upon the motion of any party, a member of the committee or any subcommittee shall, for good cause, withdraw from a proceeding to consider an application or petition.

(b) Good cause shall exist if a committee or subcommittee member has:

- (1) A direct interest in the outcome of the proceeding, including, but not limited to, a financial or family relationship within the third degree of relationships, with any party or representative;
- (2) Made statements or engaged in behavior which a reasonable person would believe indicates that he or she has prejudged the facts of the case; or

(3) Personally believes he or she cannot fairly judge the facts of the case.

(c) Mere knowledge of the issues, the parties, counsel, consultants, representatives or any witness shall not constitute good cause for withdrawal.

Site 202.04 Appearances and Representation. A party or the party's representative shall file an appearance that includes the following information:

(a) A brief identification of the matter;

(b) A statement as to whether or not the representative is an attorney and, if so, whether the attorney is licensed to practice in New Hampshire; and

(c) The party or representative's daytime address, telephone number, e-mail address, and other basic contact information.

Site 202.05 Participation of Committee and Agency Staff.

(a) The commissioner or director of each state agency that intends to participate in a committee proceeding shall advise the presiding officer of the name of the individual on the agency's staff designated to be the agency liaison for the proceeding.

(b) The presiding officer shall request the attendance of a participating state agency's designated liaison at a session of the committee or any subcommittee, if that person could materially assist the committee or subcommittee in its examination or consideration of a matter.

(c) Within 30 days of receipt of notification of a committee proceeding, a state agency not having permitting or other regulatory authority but seeking to participate in the proceeding shall advise the presiding officer of the committee in writing of such intent to participate.

(d) The presiding officer shall permit the participation of a state agency in a committee proceeding pursuant to a request submitted under (c) above if the presiding officer finds that the agency has demonstrated a material interest in the proceeding and its participation conforms with the procedural rules of the committee.

(e) All communications between the committee and state agencies regarding a pending committee proceeding shall be included in the official record of the proceeding and shall be publicly available.

Site 202.06 Format of Documents.

(a) All correspondence, pleadings, motions, petitions or other documents filed under these rules shall:

(1) Include the title and docket number of the proceeding, if known;

(2) Be typewritten or clearly printed on paper 8 ½ by 11 inches in size;

(3) Be signed by the party or proponent of the document, or if the party appears by representative, by the representative; and

(4) Include a statement certifying that the document has been served on all parties to the proceeding.

(b) The signature on a document filed with the committee or subcommittee, as applicable, shall constitute certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file the document;
- (3) To the best of the signer's knowledge, information and belief, there are good and sufficient grounds to support the document; and
- (4) The document has not been filed for purposes of delay.

Site 202.07 Service of Documents.

(a) All petitions, motions, exhibits, memoranda, comments, correspondence or other documents filed by any party to a proceeding governed by these rules shall be served by that party upon all other parties on the service list.

(b) All notices, orders, decisions or other documents issued by the committee or subcommittee, as applicable, pursuant to these rules shall be served by the presiding officer upon all parties on the service list.

(c) Service of all documents relating to a proceeding shall be made by electronic mail, unless a party or person listed on the service list has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail.

(d) If a party serving any document does not have the ability to serve such document by electronic mail, service shall be made by first class mail, postage prepaid, in the United States mail.

(e) Notwithstanding paragraphs (a) through (c), when a party appears by a representative, service shall be upon the representative by electronic mail, unless the representative has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail at the address stated in the appearance filed by the representative.

Site 202.08 Computation of Time.

(a) Unless otherwise specified, all time periods referenced in this chapter shall be calendar days.

(b) Computation of any period of time referred to in these rules shall begin with the day after the action which sets the time period in motion, and shall include the last day of the period so computed.

(c) If the last day of the period so computed falls on a Saturday, Sunday or legal holiday, then the time period shall be extended to include the first business day following the Saturday, Sunday or legal holiday.

Site 202.09 Notice of Hearing. A notice of an adjudicative hearing issued by the committee or subcommittee, as applicable, shall contain the information required by RSA 541-A:31, III and a description of the nature and location of the proposed energy facility.

Site 202.10 Prehearing Conference.

(a) Prehearing conferences shall be conducted in accordance with RSA 541-A:31.

(b) The committee or subcommittee shall designate counsel or the administrator to serve as the presiding officer for a prehearing conference when it is necessary to assure the orderly process of the proceeding.

(c) Following the prehearing conference, the presiding officer shall issue in writing to the parties and intervenors a procedural schedule for the proceeding, including a schedule for the conduct of discovery.

Site 202.11 Intervention.

(a) Persons seeking to intervene in a proceeding shall file petitions with the committee or subcommittee, as applicable, with copies served on all parties identified in the committee or subcommittee notice of hearing or prehearing conference.

(b) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall grant a petition to intervene if:

- (1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the order of notice of the hearing or prehearing conference, not less than 3 days before the hearing or prehearing conference;
- (2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests might be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law, including a state agency pursuant to RSA 162-H:7-a, VI; and
- (3) The presiding officer or hearing officer, as applicable, determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

(c) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall grant one or more late-filed petitions to intervene pursuant to RSA 541-A:32, II, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the hearings.

(d) The presiding officer, or any hearing officer designated by the presiding officer if the petition is undisputed, shall impose conditions upon an intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time, including the following conditions, if such conditions promote the efficient and orderly process of the proceeding:

- (1) Limitation of such intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
- (2) Limitation of such intervenor's use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
- (3) Requiring 2 or more such intervenors to combine their presentations of evidence and argument, cross-examination and other participation in the proceedings.

(e) Limitations imposed in accordance with paragraph (d) shall not be so extensive as to prevent such an intervenor from protecting the interest that formed the basis of the intervention.

(f) Any party aggrieved by a decision on a petition to intervene may within 10 days request that the decision be reviewed by the committee or subcommittee, as applicable.

Site 202.12 Discovery.

(a) The applicant or petitioner, the public counsel, and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule and in accordance with an applicable procedural order.

(b) Any person entitled to conduct discovery pursuant to (a) above shall have the right to serve upon any party data requests, which may consist of a written interrogatory or request for production of documents.

(c) Data requests shall identify with specificity the information or materials sought.

(d) A person or group of persons who or which are voluntarily or by order participating in the proceeding together may serve more than one set of data requests on a party, but the total number of data requests served by each person or group, as the case may be, shall not exceed 50, unless otherwise permitted by ruling of the presiding officer or any hearing officer designated by the presiding officer, upon request of the person and a finding that the proposed number of data requests is necessary to address the complexity of relevant issues and would not adversely affect the conduct of the proceeding.

(e) In determining what constitutes a data request for the purpose of applying the number limitation set forth in (d) above, each question shall be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another question, and however the questions may be grouped, combined, or arranged.

(f) A copy of each data request, each objection to data requests, and each response to data requests shall be served upon every person designated for discovery filings on the committee's official service list for the proceeding.

(g) Responses to data requests and objections to data requests shall not be filed with the committee or subcommittee.

(h) A response to a data request shall be made within 10 days of the date of receipt or in accordance with a procedural schedule established by the presiding officer or any hearing officer designated by the presiding officer in order to permit the timely and efficient conduct of the proceeding.

(i) Objections to data requests shall:

(1) Be served in writing on the propounder of the requests within 10 days following receipt of the request unless a different time period is specified in an applicable procedural order; and

(2) Clearly state the grounds on which the objections are based.

(j) Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object.

(k) Motions to compel responses to data requests shall:

(1) Be made pursuant to Site 202.14;

(2) Be made within 10 days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner;

(3) Specify the basis of the motion; and

(4) Certify that the movant has made a good-faith effort to resolve the dispute informally.

(l) The presiding officer or any hearing officer designated by the presiding officer shall authorize other forms of discovery, including technical sessions, requests for admission of material facts, depositions, and any other discovery method permissible in civil judicial proceedings before a state court, when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

(m) When a party has provided a response to a data request, and prior to the issuance of a final order in the proceeding, the party shall have a duty to reasonably and promptly amend or supplement the response if the party obtains information which the party would have been required to provide in such response had the information been available to the party at the time the party served the response.

Site 202.13 Site Inspections.

(a) The committee or subcommittee, as applicable, and public counsel shall conduct a site visit of any property which is the subject of a proceeding if requested by a party, or on its own motion, if the committee or subcommittee determines that the site visit will assist the committee or subcommittee in reaching a determination in the proceeding.

(b) The presiding officer shall determine who may attend any site visit conducted pursuant to (a) above and shall specify the conditions and restrictions applicable to the site visit.

(c) The applicant shall provide full access to the site of its proposed energy facility for any site visit conducted pursuant to (a) above at reasonable times and subject to reasonable conditions.

Site 202.14 Motions and Objections.

(a) Motions shall be in writing and filed with the committee unless made in response to a matter asserted for the first time at a hearing.

(b) Oral motions and any contemporaneous objection to such motions shall be recorded in full in the record of the hearing.

(c) The presiding officer or any hearing officer designated by the presiding officer shall direct the moving party to submit the motion in writing, with supporting information, by the deadline established by the presiding officer or hearing officer if the presiding officer or hearing officer finds that the motion requires additional information in order to be fully and fairly considered. The presiding officer or hearing officer designated by the presiding officer shall establish a deadline that promotes the efficient and orderly process of the proceeding.

(d) The moving party shall make a good faith effort to obtain concurrence with the relief sought from other parties, if the relief sought involves a postponement or extension of time.

(e) The caption of a motion shall state whether it is assented-to or contested, and shall identify within the body of the motion those parties that:

(1) Concur in the motion;

(2) Take no position on the motion;

(3) Object to the motion; and

(4) Could not be reached despite a good faith effort to do so, if the motion requests a postponement or extension of time.

(f) Objections to written motions shall be filed within 10 days after the date of the motion, unless a different time period is prescribed by the presiding officer or any hearing officer designated by the presiding officer.

(g) Failure by an opposing party to object to a motion shall not in and of itself constitute grounds for granting the motion.

(h) The presiding officer or any hearing officer designated by the presiding officer shall rule upon a motion after full consideration of all objections and other factors relevant to the motion.

Site 202.15 Waiver of Rules.

(a) The committee or subcommittee, as applicable, shall waive any of the provisions of these rules, except where precluded by statute, on its own motion or upon request by an interested party, if the committee or subcommittee finds that:

(1) The waiver serves the public interest; and

(2) The waiver will not disrupt the orderly and efficient resolution of matters before the committee or subcommittee.

(b) In determining the public interest, the committee or subcommittee shall waive a rule if:

(1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or

(2) The purpose of the rule would be satisfied by an alternative method proposed.

(c) Any interested party seeking a waiver shall make a request in writing, except as provided in (d) below.

(d) The committee or subcommittee, as applicable, shall accept for consideration any waiver request made orally during a hearing or prehearing conference.

(e) A request for a waiver shall specify the basis for the waiver and the proposed alternative, if any.

(f) Other parties shall be provided the opportunity to comment on any waiver request before the committee.

Site 202.16 Postponements.

(a) A party requesting postponement of a hearing shall file a written request with the committee or subcommittee, as applicable, not less than 7 days prior to the date of the hearing.

(b) The party requesting postponement shall make a good faith attempt to seek the concurrence of the other parties with the request.

(c) The committee or subcommittee, as applicable, shall grant a request for postponement of a hearing if it finds that to do so would promote the orderly and efficient conduct of the proceeding.

(d) If the later date, time and place are known at the time of the hearing that is being postponed, the date, time and place shall be stated on the record.

(e) If the later date, time and place are not known at the time of the hearing that is being postponed, the committee shall issue a written order stating the date, time and place of the postponed hearing as soon as practicable.

Site 202.17. Continuances.

(a) The applicant or any other party may make an oral or written motion at hearing that the hearing be continued to a later date or time, stating good cause for such requested continuance.

(b) A motion for continuance shall be granted if the presiding officer or any hearing officer designated by the presiding officer determines that ~~the moving party has stated a valid basis for the proposed continuance and the continuance will promote the orderly and efficient conduct of the proceeding and~~ assist in resolving the case fairly.

(c) If the later date, time and place are known when the hearing is continued, the information shall be stated on the record.

(d) If the later date, time and place are not known when the hearing is continued, the presiding officer or the designated hearing officer, as applicable, shall issue a written scheduling order stating the date, time and place of the continued hearing.

Site 202.18 Record of the Hearing. A record shall be kept of hearings and transcripts shall be made available in accordance with RSA 541-A:31.

Site 202.19 Burden and Standard of Proof.

(a) The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.

(b) An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.

(c) In a hearing held to determine whether a certificate, license, permit or other approval that has already been issued should be suspended, revoked or not renewed, the committee or subcommittee, as applicable, shall make its decision based on a preponderance of the evidence in the record.

Site 202.20 Order of Proceeding. Unless otherwise determined by the presiding officer upon a finding that a different order would facilitate the conduct of the proceeding fairly and expeditiously, evidence shall be offered in the following order at any proceeding before the committee or subcommittee, as applicable:

(a) The applicant or other party bearing the overall burden of proof;

(b) Intervenors; and

(c) Counsel for the public.

Site 202.21 Testimony. All testimony shall be under oath or affirmation, and shall be subject to cross-examination by parties or their representatives and to questioning by members of the committee or subcommittee, as applicable.

Site 202.22 Prefiled Testimony.

(a) An applicant's prefiled testimony and exhibits shall be filed with its application.

(b) Prefiled testimony and exhibits from other parties or rebuttal testimony from the applicant or any other party shall be filed as determined by a procedural order issued by the presiding officer.

(c) One copy of prefiled testimony and exhibits shall also be forwarded by the applicant to each party and to each person listed on the service list, through electronic mail distribution unless otherwise specified in a procedural order issued by the presiding officer.

Site 202.23 Filings and Applications.

(a) All applications, petitions and filings shall be made to the following address:

Site Evaluation Committee
c/o N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

(b) Each person filing a document shall, in addition to any required paper filing, electronically file the document, to the extent practicable, in an electronic file format compatible with the computer system of the commission.

(c) The committee shall maintain a list on its website of the types of electronic file formats compatible with the computer system of the commission.

Site 202.24 Evidence.

(a) Receipt of evidence shall be governed by the provisions of RSA 541-A:33.

(b) All documents, materials and objects offered as exhibits shall be admitted into evidence, unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.

(c) All objections to the admissibility of evidence shall be stated as early as possible in the hearing, but not later than the time when the evidence is offered.

(d) Transcripts of testimony and documents or other materials admitted into evidence shall be public records, unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5, as interpreted by case law.

Site 202.25 Public Statements.

(a) Members of the public who do not have intervenor status in a proceeding but have an interest in the subject matter shall be provided with an opportunity at a hearing or prehearing conference to state their positions.

(b) The committee shall require members of the public desiring to make oral statements at a hearing or prehearing conference to so indicate by providing their names, contact information, and parties represented on a roster made available for this purpose prior to the commencement of the hearing or prehearing conference. Individuals who do not wish to speak in public may submit a statement to be read by a person of their choice.

(c) Statements by members of the public shall be unsworn and shall not be subject to cross-examination.

(d) Any written information or reports submitted by members of the public pursuant to RSA 162-H:10, III shall be presented prior to the close of the record of the proceeding.

(e) Members of the public providing written information or reports pursuant to RSA 162-H:10, III shall provide copies of the written materials to the applicant.

(f) Records shall be maintained of all submittals of information and reports by members of the public and of all other actions, proceedings, and correspondence of or before the committee.

(g) The committee shall post on its website all written documents submitted in connection with an adjudicative proceeding, including those submitted by members of the public, except as provided in 202.24(d).

Site 202.26 Closing the Record.

(a) At the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by (b) below.

(b) Prior to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing.

(c) If the other parties in the proceeding do not object, or if the presiding officer determines that such evidence, exhibits or arguments are necessary for a full consideration of the issues raised in the proceeding, the presiding officer shall specify a date no later than 30 days after the conclusion of the hearing for the record to remain open to receive the evidence, exhibits or arguments.

(d) If any other party in the proceeding requests time to respond to the evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for the filing of a response.

(e) If any other party in the proceeding requests the opportunity to cross-examine on the additional evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for a hearing at which cross-examination on the additional evidence, exhibits or arguments submitted shall be allowed.

Site 202.27 Reopening the Record.

(a) A party may request by written motion that the record in any proceeding be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument.

(b) If the presiding officer determines that additional testimony, evidence or argument is necessary for a full consideration of the issues presented in the proceeding, the record shall be reopened to accept the offered testimony, evidence or argument.

(c) The presiding officer shall specify a date no later than 30 days from the date of receiving the additional testimony, evidence or argument by which other parties shall respond to or rebut the newly submitted testimony, evidence or argument.

Site 202.28 Issuance or Denial of Certificate.

(a) The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(b) The committee shall keep a written decision or order and all filings related to an application on file in its public records for not less than 5 years following the date of the final decision or order or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to a uniform procedures manual rules adopted under RSA 5:40.

Site 202.29 Rehearing.

(a) The rules in this section are intended to supplement RSA 541, which requires or allows a person to request rehearing of an order or decision of the committee prior to appealing the order or decision.

(b) The rules in this section shall apply whenever any person has a right under applicable law to request a rehearing of an order or decision prior to filing an appeal of the order or decision with the court having appellate jurisdiction.

(c) A motion for rehearing shall be filed within 30 days of the date of a committee decision or order.

(d) A motion for rehearing shall:

(1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;

(2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable, ~~or illegal in respect to jurisdiction, authority or observance of the law, an abuse of discretion or arbitrary, unreasonable or capricious;~~

(3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and

(4) Include any argument or memorandum of law the moving party wishes to file.

(e) The committee shall grant or deny a motion for rehearing, or suspend the order or decision pending further consideration, within 10 days of the filing of the motion for rehearing.

Site 202.30 Ex Parte Communications Prohibited.

(a) Committee members shall not communicate directly or indirectly with any person or party about the merits of an application or petition, unless all parties are given notice of the communication and are afforded an opportunity to participate.

(b) Communications between or among committee members, or between committee members and their attorneys, the administrator or committee staff, or between or among the presiding officer and one or more personal assistants or support staff personnel are not prohibited under this section.

PART Site 203 DECLARATORY RULINGS

Site 203.01 Declaratory Rulings.

(a) Any person may submit a petition for declaratory ruling from the committee on matters within its jurisdiction by filing an original written petition and 10 copies with the committee.

(b) A petition for declaratory ruling shall set forth the following information:

(1) The exact ruling being requested; and

- (2) The statutory and factual basis for the requested ruling, including any supporting affidavits or memoranda of law.

Site 203.02 Action on Requests.

(a) The person filing a petition to request a declaratory ruling shall provide such further information or participate in such evidentiary or other proceedings as the committee shall direct after reviewing the petition and any objections or other replies received with respect to the petition.

(b) Upon review and consideration, the committee shall issue a written ruling either granting or denying the petition, including an explanation of the factual and legal basis for granting or denying the petition, within 90 days of receipt of the petition.

(c) The committee may dismiss a petition for declaratory ruling that:

- (1) Fails to set forth factual allegations that are definite and concrete;
- (2) Involves a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case;
- (3) Does not implicate the legal rights or responsibilities of the petitioner; or
- (4) Is not within the committee's jurisdiction.

PART Site 204 RULEMAKING

Site 204.01 How Adopted.

(a) A rule of the committee or any amendment or repeal thereof shall be adopted by the committee after notice and opportunity for hearing in accordance with this part.

(b) Rules may be proposed by any person or by the committee.

Site 204.02 Manner for Adoption.

(a) The committee shall commence a rulemaking proceeding by drafting a proposed rule or by accepting as a proposed rule the draft of a rule proposed by any person.

(b) With respect to any proposed rule, the committee shall conduct rulemaking and adoption proceedings pursuant to RSA 541-A.

Site 204.03 Requests to Committee for Rulemaking. A request from an interested person proposing the adoption, amendment or repeal of a rule shall be submitted, received and resolved in the following manner:

- (a) Requests shall be submitted to the committee by letter addressed to the chairperson;
- (b) Requests shall contain the following:
 - (1) The date of the request;
 - (2) The name, address and telephone number of the person making the request; and
 - (3) The name and address of any other person or organization represented by the person making the request;

(c) The person making the request shall sign the request;

(d) The request shall be typed or printed in a legible fashion;

(e) The person making the request shall cite the rule and its provisions and specify any changes desired if repeal or amendment is sought, and, if possible, shall provide the text of the proposed rule if promulgation is sought;

(f) The person making the request shall include a detailed and complete statement of the reasons offered in support of the requested action;

(g) If the committee determines that any rulemaking request is deficient in any respect, the committee shall, within 15 days of receipt of said request, notify the person making the request in writing of the specific deficiencies and allow such person to amend the request;

(h) Within 30 days of receipt of a request or amended request for rulemaking, the committee shall take one of the following actions:

(1) Initiate the requested rulemaking procedures, in accordance with this part; or

(2) Deny the request, in writing, stating the reasons for denial;

(i) The committee shall grant the rulemaking request if the request is consistent with statute and case law and will assist the committee with its statutory duties.

Site 204.04 Request for Notice of Intended Rulemaking Action. Pursuant to the provisions of RSA 541-A:6, III, the committee shall maintain a current listing of all persons having made a request for advance notice of rulemaking proceedings.

Site 204.05 Public Hearing.

(a) If the committee initiates rulemaking proceedings under RSA 541-A, or if rulemaking is initiated pursuant to a request for rulemaking, the committee shall hold not less than one public hearing pursuant to RSA 541-A:11.

(b) Notice shall be given not less than 20 days prior to the public hearing pursuant to RSA 541-A:6, I.

(c) The committee shall limit the time allowed at hearing for each person's comments when necessary to allow all persons who wish to make oral comments a reasonable opportunity to do so.

(d) The committee shall require persons desiring to make oral comments to so indicate by providing their names, contact information, and parties represented on a roster made available for this purpose prior to the commencement of the public hearing.

(e) The committee shall permit persons to submit written comments in any rulemaking proceeding for a period of time ending not less than 5 days following the close of the public hearing.

APPENDIX A

Rule	Statute
Site 101.01-02	RSA 162-H:3, 4, and 10,VI and VII; RSA 541-A:16, I (a)
Site 102.01-57	RSA 162-H:2 and 10,VI and VII
Site 103.01	RSA 162-H:3, 4, and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.02	RSA 162-H:3 and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.03	RSA 162-H:4-a and 10,VI and VII; RSA 541-A:16, I (a)
Site 103.04	RSA 162-H:3-a, 4, and 10,VI and VII; RSA 541-A:16,I(a)
Site 103.05	RSA 162-H:9 and 10,VI and VII; RSA 541-A:16, I (a)
Site 104.01	RSA 162-H:10,VI and VII, 13; RSA 541-A:16, I (a)
Site 201.01	RSA 162-H:10,I, VI and VII
Site 201.02	RSA 162-H:10,I-a, VI and VII
Site 201.03	RSA 162-H:10,I-c, VI and VII
Site 201.04	RSA 162-H:10,I-b, VI and VII
Site 202.01	RSA 162-H:10,VI and VII; RSA 541-A:30-a
Site 202.02	RSA 162-H:4, 4-a, 10,VI and VII; RSA 541-A:30-a
Site 202.03	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (k)
Site 202.04	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.05	RSA 162-H:7-a, 10,VI and VII; and RSA 541-A:30-a,III
Site 202.06-07	RSA 162-H:10,VI and VII; and RSA 541-A:30-a,III
Site 202.08	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (f)
Site 202.09	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III and 31, III
Site 202.10	RSA 162-H:10,VI and VII; RSA 541-A:31,V(c)
Site 202.11	RSA 162-H:4,V, 10,VI and VII; RSA 541-A:32
Site 202.12-14	RSA 162-H:10,VI and VII; RSA 541-A:30-a
Site 202.15	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (j)
Site 202.16	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.17	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (h)
Site 202.18	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.19	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (d) and (e)
Site 202.20-23	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.24-25	RSA 162-H:10,VI and VII; RSA 162-H:10, III
Site 202.26	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 202.27	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III (i)
Site 202.28	RSA 162-H:10,VI and VII, 16, IV; RSA 541-A:35
Site 202.29	RSA 162-H:10,VI and VII; RSA 541
Site 202.30	RSA 162-H:10,VI and VII; RSA 541-A:30-a,III
Site 203.01-02	RSA 162-H:10,VI and VII; RSA 541-A:16,I(d)
Site 204.01-05	RSA 162-H:10,VI and VII; RSA 541-A:16,I(c)

APPENDIX B: INCORPORATION BY REFERENCE INFORMATION

RULE	TITLE/CITATION (DATE)	SOURCE
Site 102.23	36 C.F.R. §800.16(l)(1) (2014)	Available from U.S. Government Publishing Office, http://www.gpo.gov

State of New Hampshire
Site Evaluation Committee

ASH
12/1



Martin P. Honigberg, Esquire
Chairman

Thomas S. Burack, Esquire
Vice-Chair

Pamela G. Monroe
SEC Administrator

<http://www.nhsec.nh.gov>
21 South Fruit St., Suite 10
Concord, New Hampshire
03301-2429
Telephone (603) 271-2435
Fax (603) 271-3878

NOV 25 2015

November 25, 2015

Preliminary
OBJECTION
RESPONSE FP 2015-12

Rep. Carol M. McGuire, Chair
Joint Legislative Committee on Administrative Rules
State House Annex, Room 219
25 Capitol Street
Concord, NH 03301-6312

"Note to JLCAR" p. 1.
Substantive comments (see attached)
relate to rules
on p. 3, 5, 11, 12,
19, 20, 23, +24.

**Re: Response to Preliminary Objection to FP 2015-11 and FP 2015-12
Site 100 and Site 201-204 - Organizational Rules and Rules of
Practice and Procedure of the Site Evaluation Committee
Site 205 and 300 - Explanation of Proposed Rule and Certificates
of Site and Facility Rules of the Site Evaluation Committee
SEC Docket No. 2014-04**

Dear Chair McGuire:

I write to you as Chairman of the Site Evaluation Committee (SEC) in response to the preliminary objection issued by the Joint Legislative Committee on Administrative Rules (Committee) to Final Proposals 2015-11 and 2015-12 regarding the SEC's Site 100-300 rules. The preliminary objection was entered on October 15, 2015, by vote of the Committee, pursuant to RSA 541-A:13, IV, based on the grounds as outlined in the Committee staff annotations to the final proposals, on the written testimony provided to the Committee prior to its meeting, on oral and written public testimony provided by the public at the Committee's meeting, and on the Committee's concerns as reflected by its comments at the meeting.

In order to address the Committee's preliminary objection, SEC Staff held a technical session with interested stakeholders on October 28, 2015, to seek resolution of the two primary bases of objections raised by public submissions and identified by the Committee: (1) the "public interest" siting criteria set forth in Site 301.16, and (2) the "cumulative impacts" analysis requirement set forth in Site 301.14(g). The technical session did not result in a consensus position regarding resolution of these two issues.

The SEC met on November 18, 2015, to consider the preliminary objection, and to develop and then approve the substance of this response to the preliminary objection. At that meeting, the SEC also established the text of rules language changes to be submitted in connection with its response and, as described below, authorized its Chairman to request revised objections at the relevant Committee meeting in order to avoid a final objection and/or joint resolution with respect to a number of issues covered by the preliminary objection.

The rules language changes approved by the SEC at its November 18 meeting, including a number of substantive revisions and certain editorial revisions, are incorporated in the annotated versions of the Site 100-204 rules and the Site 205-300 rules submitted herewith. Also attached are revised versions of Appendix A and Appendix B which address comments made by Committee staff counsel.

The following addresses in greater detail specific issues covered by the preliminary objection and the SEC's response to such issues:

Public Interest Criteria

The preliminary objection incorporated comments submitted by Northern Pass Transmission, the New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the public interest siting criteria in Site 301.16 in the Final Proposal were inconsistent with the legislature's intent based on the legislative history of Senate Bill 245 of 2014 (SB 245). Northern Pass also claimed that the public interest criteria were inconsistent with the other siting standards under RSA 162-H:16, IV.

EDP Renewables asserted that the public interest siting criteria were objectionable because they required consideration of a facility's consistency with local plans and policies and with municipal master plans and land use regulations. EDP Renewables also challenged the inclusion of a reference in the criteria to the state energy policy as contrary to legislative intent, based on the 2009 repeal of a requirement that the SEC determine that a proposed facility is consistent with this policy.

Joe Lukeman claimed that the public interest criteria were objectionable because they do not differentiate between essential and elective energy projects, and because they do not fully consider the economy of a town or the impact on a town's master plan.

In response to the preliminary objection, the SEC has revised the provisions of Site 301.16 to remove the language that was subject to the objections based on legislative intent and instead to require the SEC to consider a list of values and factors that is taken directly from the purpose section of the statute, RSA 162-H:1. The SEC also expressly authorized its Chairman to request that the Committee issue a revised objection if it appears that the Committee would find the revised language to be objectionable. Such a revised objection request could be either to restore the language included in the final proposal or to entirely remove Site 301.16 and not include any specific public interest siting criteria, as determined in the discretion of the Chairman during the Committee meeting.

The SEC approved these actions in response to the preliminary objection without finding that the public interest criteria set forth in the final proposal were inconsistent with the intent of the legislature in adopting the SB 245 amendments to RSA 162-H. The legislative history of SB 245, while perhaps not completely clear on this point, does not compel the conclusion that the final proposal criteria violate this legislative intent.

We note further that SB 245, in addition to requiring that the SEC find that issuance of a certificate “will serve the public interest,” also amended RSA 162-H:16, IV to include the following sentence (emphasis added):

After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.

SB 245 also amended the SEC rulemaking mandate in RSA 162-H:10, VII to require that the SEC adopt rules relative to the criteria for siting energy facilities, “including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility.” Notably, this amendment *broadened* the scope of the rulemaking directive to adopt specific criteria to encompass *all* of RSA 162-H:16, IV, including the “public interest” finding under subsection (e) and the sentence quoted above, while the prior language of this section had referenced only subsections (b) and (c) of RSA 162-H:16, IV.

This appears to be strong evidence of the legislature’s intent that the SEC adopt specific criteria regarding the required “public interest” finding and the determination called for under the quoted sentence. The SEC did so through its adoption of the final proposal language of Site 301.16 and, in response to the preliminary objection, it has now revised the language of this section to more explicitly cover the values and factors referenced in the statutory purpose section, RSA 162-H:1. We believe this revision has removed any potential basis for objection to the public interest siting criteria set forth in Site 301.16.

Cumulative Impacts Analysis

The preliminary objection incorporated comments submitted by Northern Pass Transmission, New England Ratepayers Association, Monadnock Paper Mills, and the International Brotherhood of Electrical Workers asserting that the requirement set forth in Site 301.14(g) that the SEC analyze the “cumulative impacts” of all energy facilities on public health and safety, natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including aesthetic impacts and sound impacts, was inconsistent with legislative intent. Their assertion is based on the removal during the SB 245 legislative process of language that would have applied a cumulative impacts analysis to all energy facilities, as well as the inclusion through other legislative enactments of specific references to a cumulative impacts analysis for wind energy systems (RSA 162-H:10-a) and natural gas pipelines (RSA 162-H:10-b). Northern Pass also claimed that the required cumulative impacts analysis, as applied to non-wind energy facilities, was inconsistent with the other siting standards under RSA 162-H:16, IV.

The SEC was advised during its November 18 meeting that there may be a stronger basis to question whether the broader cumulative impacts analysis requirement is consistent with the legislature’s intent, in view of this legislative history and principles of statutory construction. The SEC decided to revise the language of Site 102.18, Site 301.03(h)(6), and Site 301.14(g), such that those rules

provisions regarding cumulative impacts would apply only to wind energy facilities and not to other types of energy facilities. We believe this revision has removed any potential basis for objection to the provisions of Site 301.14(g).

Municipal Preemption Impermissible

The preliminary objection incorporated comments submitted by the Towns of Easton, Littleton, Sugar Hill, Bethlehem, and Monroe, Executive Councilor Joe Kenney, and several other individuals, asserting that municipal master plans and other local land use regulations, plans and policies should not be preempted through the SEC's energy facility certificate process.

We would note as an initial matter that the final proposal does not include a rule that could fairly be characterized as one calling for preemption of municipal regulation. During the course of the rulemaking process, many individuals and entities proposed rules that would require projects subject to the SEC's jurisdiction to comply with local ordinances. The SEC declined to adopt any of those proposals.

Substantively, the SEC does not believe any change to the rules is appropriate regarding this issue. Under the New Hampshire Supreme Court precedent in *PSNH v. Town of Hampton*, 120 N.H. 68 (1980), it is clear that municipal planning and zoning are preempted by the pervasive state siting process implemented by the SEC. Since that judicial decision was issued, the legislature has not amended the statute in any way that affects this conclusion. The SEC therefore has made no revision to the proposed rules in response to these comments.

Municipal Veto Impermissible

The preliminary objection incorporated comments submitted by New England Ratepayers Association and EDP Renewables, asserting that the requirements for applicants to submit and the SEC to consider the municipal master plans and local zoning ordinances of certain host and affected communities are arguably irrelevant to the SEC process because of state preemption under the *Town of Hampton* case cited above. EDP Renewables argued that this requirement under Site 301.09 is beyond the SEC's authority.

These comments effectively present a "mirror image" of the municipal preemption issue addressed in the preceding section above. The SEC was advised that the proposed rules merely require filing of municipal master plans and zoning ordinances as written evidence of municipal views on relevant issues as permitted by statute. These are only factors to be considered by the SEC and are subject to SEC preemption under the Supreme Court precedent as noted above. The SEC therefore has made no revision to the proposed rules in response to these comments.

Transmission Setbacks Specific Criteria

The preliminary objection incorporated comments submitted by Pamela Martin, Kris Pastoriza, and a number of other individuals, asserting that the proposed SEC rules amendments should include

specific setback restrictions for electric transmission projects, and that the failure to do so is inconsistent with the SEC rulemaking directive under RSA 162-H:10, VII.

Through the public rulemaking process, the SEC was persuaded that specific setback distances would not be appropriate in all situations, so it would be preferable to permit specification of applicable setbacks and safety zones on an individualized, case-by-case basis, based on the record as developed for each application. The SEC believes that conclusion represents a policy determination made by the SEC and is not a proper ground for objection before the Committee. The SEC therefore has made no revision to the proposed rules in response to these comments.

Site Control and Eminent Domain

The preliminary objection incorporated testimony and comments presented by Senator Jeannie Forrester and by Dorothy McPhaul, effectively asserting that the SEC should not provide or recognize the exercise of eminent domain by applicants to secure site or route control. As stated by the SEC Chairman during the Committee's October 15th meeting and reiterated at the SEC's November 18th meeting, the SEC has no authority to grant eminent domain rights to an applicant or to any other party.

The site control requirements of proposed Site 301.03(c)(6) contain a narrow exception for applicants that can demonstrate they have taken action that may lead to eminent domain authority under a *separate* source of law, such as FERC interstate natural gas pipeline certification. Those applicants may submit an application to the SEC if they have initiated a federal regulatory proceeding or taken other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the proposed facility thereon. The SEC concluded that the related testimony and comments do not form a basis for objection, and therefore the SEC has made no revision to the proposed rules in response to these comments.

Decommissioning Plans for Energy Facilities

The preliminary objection incorporated comments submitted by Dorothy McPhaul and by EDP Renewables with respect to the decommissioning plan requirements set forth in Site 301.08(a)(7) and (c)(2). Ms. McPhaul argued that the rules should not permit applicants to provide decommissioning plan financial assurance in the form of corporate guaranties, and that the removal of structures and site restoration should be required for all energy facilities and not only for wind energy systems.

EDP Renewables argued that the express exclusion of potential salvage value when determining the required amount of decommissioning plan funding is inconsistent with legislative intent, because such exclusion was included in a prior version of the legislation which was eventually enacted through House Bill 1602 of 2014, but was removed prior to enactment. EDP Renewables also asserted that the listed forms of financial assurance are financially onerous and are not required by statute.

The SEC determined that the specific financial assurance requirements for energy facility decommissioning plans are policy decisions that it made after consideration of extensive and detailed comments submitted through the public rulemaking process. With respect to the exclusion of salvage

value from decommissioning plan funding amount calculations, the SEC concluded that this was not contrary to legislative intent but also falls within the purview of its policymaking authority. The SEC therefore has made no revision to the proposed rules in response to these comments.

EDP Renewables' Other Objections

The preliminary objection incorporated additional comments submitted by EDP Renewables, a developer and operator of wind energy facilities, objecting to the following proposed SEC rules provisions:

- (1) the eight-hour annual shadow flicker limit under Site 301.14(f)(2)b;
- (2) the inclusion of energy facilities for which the SEC has accepted an application in the definition of "cumulative impacts" under Site 102.18;
- (3) the requirement that wind energy facility applicants submit photosimulations from a sample of private property observation points, to the extent feasible, under Site 301.05(b)(7); and
- (4) the requirement that applicants provide notice of initial public information sessions to abutting property owners by certified mail, under Site 201.01(b).

The SEC determined that the specified shadow flicker hour limit, the inclusion of accepted applications in the "cumulative impacts" definition, and the requirement for submission of photosimulations from a sample of private property observation points, are all policy decisions squarely within the SEC's rulemaking authority that were made after consideration of comments submitted through the public rulemaking process. The SEC further determined that the requirement that abutting property owners be given notice of initial public information sessions by certified mail is not inconsistent with the statutory notice provisions under RSA 162-H:10, I. The SEC therefore has made no revisions to the proposed rules in response to these additional comments of EDP Renewables.

Committee Staff Issues

The preliminary objection included the grounds as outlined in Committee staff annotations to the SEC's final proposals. A number of those issues have been resolved by the SEC in rules language revisions incorporated in the attached annotated rules documents. Other such issues were addressed by the SEC as follows:

"Scenic quality" definition (Site 102.44). Committee staff commented that this definition is overly subjective, and that it includes substantive aspects and so should be moved to the Site 300 rules. The SEC determined that the concept of aesthetic significance embodied in this definition is to a great extent inherently subjective and does not lend itself to more definitive explication. The SEC also noted that this term is referenced in a number of other definitions in Site 102, and so should remain in this section of the proposed rules. The SEC therefore has made no revisions to the proposed rules in response to

these comments.

Subcommittee formation (Site 103.03(a) and (d)). Committee staff commented that these proposed rules provisions should specify the circumstances and criteria for formation of subcommittees. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

State agency member designation of senior staff person (Site 103.03(d)(1)). Committee staff commented that this proposed rules provision should specify the circumstances and criteria for designation by state agency SEC members of senior staff to serve in their stead. The SEC noted that the proposed rules language tracks and cites the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

SEC public hearing in county or counties (Site 201.03(a) and (b)). Committee staff commented that the procedures for the SEC's non-adjudicative public hearings in the energy facility host county or counties should be specified, as in the NHDES Env-C 205 rules. The SEC noted that the proposed rules language tracks the relevant statutory provisions and that the NHDES rules seem inapposite. The SEC, however, did approve additions to Site 201.03 regarding public comments, transcripts, and website posting of information submitted in connection with its public hearings held in the county or counties.

Additional information sessions (Site 201.04). Committee staff commented that this proposed rules provision should specify the factors to be considered by the SEC when determining if any additional sessions are reasonable. The SEC noted that the proposed rules language tracks and cites the relevant statutory provision. The SEC therefore has made no revision to the proposed rules in response to this comment; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of this rules provision, if it appears that the Committee would find the proposed rules language to be objectionable.

Conditions of certificate (Site 301.17). Committee staff commented that this proposed rules provision should specify under what circumstances the enumerated potential certificate conditions will be imposed, and what factors and criteria will be assessed when making these decisions. The SEC has addressed this comment by adding the phrase "in order to meet the purposes of RSA 162-H" to the introductory language in Site 301.17.

Access to facility site for inspection and monitoring (Site 302.01(b)). Committee staff commented that this proposed rules provision may violate the Fourth Amendment to the United States Constitution if no pre-compliance review is provided for prior to an agency search of business premises, citing the June 2015 decision of the Supreme Court of the United States in *City of Los Angeles v. Patel*. The SEC has addressed this comment through revision of this subsection in the proposed rules.

Suspension of certificate by SEC (Site 302.01(f) and 302.02(d)). Committee staff commented regarding the use of “may” rather than “shall” in these proposed rules provisions, and indicated that the SEC should specify the basis on which it might *not* suspend a certificate following a violation or misrepresentation. The SEC noted that these proposed rules track and cite the relevant statutory provisions. The SEC therefore has made no revision to the proposed rules in response to these comments; however, the SEC expressly authorized its Chairman to request that the Committee issue a revised objection directing removal of these rules provisions, if it appears that the Committee would find the proposed rules language to be objectionable.

Based on this response and the related rules language revisions shown in the enclosed documents, the SEC believes that the Committee’s preliminary objection has been fully addressed and resolved, and that no further basis exists for objection to the proposed Site 100-300 rules amendments. The SEC respectfully requests that the Committee approve the revised rules submitted with this response without further amendment or objection.

Thank you for your attention to this matter.

Sincerely,



Martin P. Honigberg
Chairman

Enclosures
cc: Service List

Readopt Site 205, effective 6-17-08 (Document #9183-B), to read as follows:

Site 205 EXPLANATION OF PROPOSED RULE

Site 205.01 Explanation of Proposed Rule.

(a) If requested by an interested person at any time before 30 days after final adoption of a rule, the committee shall issue a written explanation of the rule pursuant to RSA 541-A:11, VII.

(b) An explanation issued pursuant to this section shall include:

- (1) A concise statement of the principal reasons for and against the adoption of the rule in its final form; and
- (2) An explanation of why the committee overruled the arguments and considerations against the rule.

Note to JLCAR: These will be non-expiring rules, unlike Site 300.

Readopt with amendments Site 300, effective 6-17-08 (Document #9183-B), to read as follows:

CHAPTER Site 300 CERTIFICATES OF SITE AND FACILITY

PART Site 301 REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATES

Site 301.01 Filing.

(a) Each applicant for a certificate for an energy facility shall file with the committee one original and 15 paper copies of its application and an electronic version of its application in PDF format, unless otherwise directed by the chairperson or the administrator, after consultation by the chairperson or administrator with state agencies that are required to be provided a copy of the application under this chapter, in order to permit the timely and efficient review and adjudication of the application.

(b) The committee or the administrator shall:

- (1) Acknowledge receipt of an application filed under Site 301.01(a) in writing directed to the applicant;
- (2) Forward a copy of the application and acknowledgment to each member of the committee;
- (3) Forward a copy of the application to each state agency required to receive a copy under Site 301.10(a) and (b); and
- (4) Post a copy of each application on the committee's website.

Site 301.02 Format of Application.

(a) Paper copies of applications shall be prepared on standard 8 ½ x 11 inch sheets, and plans, maps, photosimulations, and other oversized documents shall be folded to that size or rolled and provided in protective tubes. Electronic copies of applications shall be submitted through electronic mail, on compact discs, or in an electronic file format compatible with the computer system of the commission.

(b) Each application shall contain a table of contents.

(c) All information furnished shall appear in the same order as the requirements to provide that information appear in Site 301.03 through 301.09.

(d) If any numbered item is not applicable or the information is not available, an appropriate comment shall be made so that no numbered item shall remain unanswered.

(e) To the extent practicable, copies of applications shall be double-sided.

Site 301.03 Contents of Application.

(a) Each application for a certificate of site and facility for an energy facility shall be signed and sworn to by the person, or by an authorized executive officer of the corporation, company, association, or other organization making such application.

(b) Each application shall include the information contained in this paragraph, and in (c) through (h) below, as follows:

- (1) The name of the applicant;
- (2) The applicant's mailing address, telephone and fax numbers, and e-mail address;

- (3) The name and address of the applicant's parent company, association, or corporation, if the applicant is a subsidiary;
- (4) If the applicant is a corporation:
 - a. The state of incorporation;
 - b. The corporation's principal place of business; and
 - c. The names and addresses of the corporation's directors, officers, and stockholders;
- (5) If the applicant is a limited liability company:
 - a. The state of the company's organization;
 - b. The company's principal place of business; and
 - c. The names and addresses of the company's members, managers, and officers;
- (6) If the applicant is an association, the names and addresses of the residences of the members of the association; and
- (7) Whether the applicant is or will be the owner or lessee of the proposed facility or has or will have some other legal or business relationship to the proposed facility, including a description of that relationship.

(c) Each application shall contain the following information with respect to the site of the proposed energy facility and alternative locations the applicant considers available for the proposed facility:

- (1) The location and address of the site of the proposed facility;
- (2) Site acreage, shown on an attached property map and located by scale on a U.S. Geological Survey or GIS map;
- (3) The location, shown on a map, of property lines, residences, industrial buildings, and other structures and improvements within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property;
- (4) Identification of wetlands and surface waters of the state within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;
- (5) Identification of natural, historic, cultural, and other resources at or within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;
- (6) Evidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of:
 - a. Ownership, ground lease, easement, or other contractual right or interest;

See attached comment 5.

b. A license, permit, easement, or other permission from a federal, state, or local government agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application; or

c. The simultaneous filing of a federal regulatory proceeding or taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the facility thereon; and

(7) Evidence that the applicant has a current or conditional right of access to private property within the boundaries of the proposed energy facility site sufficient to accommodate a site visit by the committee, which private property, with respect to energy transmission pipelines under the jurisdiction of the Federal Energy Regulatory Commission, may be limited to the proposed locations of all above-ground structures and a representative sample of the proposed locations of underground structures or facilities.

(d) Each application shall include information about other required applications and permits as follows:

(1) Identification of all other federal and state government agencies having permitting or other regulatory authority, under federal or state law, to regulate any aspect of the construction or operation of the proposed energy facility;

(2) Documentation that demonstrates compliance with the application requirements of all such agencies;

(3) A copy of the completed application form for each such agency; and

(4) Identification of any requests for waivers from the information requirements of any state agency or department having permitting or other regulatory authority whether or not such agency or department is represented on the committee.

(e) If the application is for an energy facility, including an energy transmission pipeline, that is not an electric generating facility or an electric transmission line, the application shall include:

(1) The type of facility being proposed;

(2) A description of the process to extract, produce, manufacture, transport or refine the source of energy;

(3) The facility's size and configuration;

(4) The ability to increase the capacity of the facility in the future;

(5) Raw materials used or transported, as follows:

a. An inventory, including amounts and specifications;

b. A plan for procurement, describing sources and availability; and

c. A description of the means of transportation;

(6) Production information, as follows:

a. An inventory of products and waste streams;

- b. The quantities and specifications of hazardous materials; and
- c. Waste management plans; and

(7) A map showing the entire energy facility, including, in the case of an energy transmission pipeline, the location of each compressor station, pumping station, storage facility, and other ancillary facilities associated with the energy facility, and the corridor width in the case of a proposed new route or widening along an existing route.

(f) If the application is for an electric generating facility, the application shall include the following information:

- (1) Make, model, and manufacturer of each turbine and generator unit;
- (2) Capacity in megawatts, as designed and as intended for operation;
- (3) Type of turbine and generator unit, including:
 - a. Fuel utilized;
 - b. Method of cooling condenser discharge; and
 - c. Unit efficiency;
- (4) Any associated new substations, generator interconnection lines, and electric transmission lines, whether identified by the applicant or through a system impact study conducted by or on behalf of the interconnecting utility or ISO New England, Inc.;
- (5) Copy of system impact study report for interconnection of the facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application;
- (6) Construction schedule, including start date and scheduled completion date; and
- (7) Description of anticipated mode and frequency of operation of the facility.

(g) If the application is for an electric transmission line or an electric generating facility with an associated electric transmission or distribution line; the application shall include the following information:

- (1) Location shown on U.S. Geological Survey Map;
- (2) A map showing the entire electric transmission or distribution line project, including the height and location of each pole or tower, the distance between each pole or tower, and the location of each substation, switchyard, converter station, and other ancillary facilities associated with the project;
- (3) Corridor width for:
 - a. New route; or
 - b. Widening along existing route;
- (4) Length of line;
- (5) Distance along new route;

- (6) Distance along existing route;
- (7) Voltage design rating;
- (8) Any associated new electric generating unit or units;
- (9) Type of construction described in detail;
- (10) Construction schedule, including start date and scheduled completion date;
- (11) Copy of any proposed plan application or other system study request documentation required to be submitted to ISO New England, Inc. in connection with construction and operation of the proposed facility; and
- (12) Copy of system impact study report for the proposed electric transmission facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application.

(h) Each application for a certificate for an energy facility shall include the following:

- (1) A detailed description of the type and size of each major part of the proposed facility;
- (2) Identification of the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the preferred choice;
- (3) Documentation that the applicant has held at least one public information session in each county where the proposed facility is to be located at least 30 days prior to filing its application, pursuant to RSA 162-H:10, I and Site 201.01;
- (4) Documentation that written notification of the proposed facility, including copies of the application, has been given to the governing body of each municipality in which the facility is proposed to be located, and that written notification of the application filing, including information regarding means to obtain an electronic or paper version of the application, has been sent by first class mail to the governing body of each of the other affected communities;
- (5) The information described in Sections 301.04 through 301.09;

See attached comment 2.

(6) For a proposed wind energy facility, information regarding the cumulative impacts of the proposed ~~energy~~ facility on natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of wind energy facilities by the viewer;

(7) Information describing how the proposed facility will be consistent with the public interest, including the specific criteria set forth in Site 301.16(a)-(jd); and

(8) Pre-filed testimony and exhibits supporting the application.

Site 301.04 Financial, Technical and Managerial Capability. Each application shall include a detailed description of the applicant's financial, technical, and managerial capability to construct and operate the proposed energy facility, as follows:

(a) Financial information shall include:

- (1) A description of the applicant's experience financing other energy facilities;
- (2) A description of the corporate structure of the applicant, including a chart showing the direct and indirect ownership of the applicant;
- (3) A description of the applicant's financing plan for the proposed facility, including the amounts and sources of funds required for the construction and operation of the proposed facility;
- (4) An explanation of how the applicant's financing plan compares with financing plans employed by the applicant or its affiliates, or, if no such plans have been employed by the applicant or its affiliates, then by unaffiliated project developers if and to the extent such information is publicly available, for energy facilities that are similar in size and type to the proposed facility, including any increased risks or costs associated with the applicant's financing plan; and
- (5) Current and pro forma statements of assets and liabilities of the applicant;

(b) Technical information shall include:

- (1) A description of the applicant's qualifications and experience in constructing and operating energy facilities, including projects similar to the proposed facility; and
- (2) A description of the experience and qualifications of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time of application;

(c) Managerial information shall include:

- (1) A description of the applicant's management structure for the construction and operation of the proposed facility, including an organizational chart for the applicant;
- (2) A description of the qualifications of the applicant and its executive personnel to manage the construction and operation of the proposed facility; and
- (3) To the extent the applicant plans to rely on contractors or consultants for the construction and operation of the proposed facility, a description of the experience and qualifications of the contractors and consultants, if known at the time of application.

Site 301.05 Effects on Aesthetics.

(a) Each application shall include a visual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.

(b) The visual impact assessment shall contain the following components:

- (1) A description and map depicting the locations of the proposed facility and all associated buildings, structures, roads, and other ancillary components, and all areas to be cleared and graded, that would be visible from any scenic resources, based on both bare ground conditions

using topographic screening only and with consideration of screening by vegetation or other factors;

(2) A description of how the applicant identified and evaluated the scenic quality of the landscape and potential visual impacts;

(3) A narrative and graphic description, including maps and photographs, of the physiographic, historical and cultural features of the landscape surrounding the proposed facility to provide the context for evaluating any visual impacts;

(4) A computer-based visibility analysis to determine the area of potential visual impact, which, for proposed:

- a. Wind energy systems shall extend to a minimum of a 10-mile radius from each wind turbine in the proposed facility;
- b. Electric transmission lines longer than 1 mile shall extend to a ½ mile radius if located within any urbanized area;
- c. Electric transmission lines longer than 1 mile shall extend to a 2 mile radius if located within any urban cluster;
- d. Electric transmission lines longer than 1 mile if located within any rural area shall extend to:
 1. A radius of 3 miles if the line would be located within an existing transmission corridor and neither the width of the corridor nor the height of any towers, poles, or other supporting structures would be increased; or
 2. A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased;

(5) An identification of all scenic resources within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible;

(6) A characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low, based on consideration of the following factors:

- a. The expectations of the typical viewer;
- b. The effect on future use and enjoyment of the scenic resource;
- c. The extent of the proposed facility, including all structures and disturbed areas, visible from the scenic resource;
- d. The distance of the proposed facility from the scenic resource;
- e. The horizontal breadth or visual arc of the visible elements of the proposed facility;

- f. The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;
- g. The duration and direction of the typical view of elements of the proposed facility; and
- h. The presence of intervening topography between the scenic resource and elements of the proposed facility;

(7) Photosimulations from representative key observation points, from other scenic resources for which the potential visual impacts are characterized as “high” pursuant to (6) above, and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility; ~~photographs used in the simulation shall be taken at high resolution and contrast, using a full frame digital camera with a 50 millimeter fixed focal length lens or digital equivalent that creates an angle of view that closely matches human visual perception, under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions; photosimulations shall be printed at high resolution at 15.3 inches by 10.2 inches, or 390 millimeters by 260 millimeters; at least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons; photosimulations shall meet the following additional requirements:~~

Edit: New (8), and renumber below.

a. Photographs used in the simulation shall be taken at high resolution and contrast, using a full frame digital camera with a 50 millimeter fixed focal length lens or digital equivalent that creates an angle of view that closely matches human visual perception, under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions;

b. Photosimulations shall be printed at high resolution at 15.3 inches by 10.2 inches, or 390 millimeters by 260 millimeters;

c. At least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons;

da. -Field conditions in which a viewpoint is photographed shall be recorded including:

1. Global Position System (GPS) location points with an accuracy of at least 3 meters for each simulation viewpoint to ensure repeatability;
2. Camera make and model and lens focal length;
3. All camera settings at the time the photograph is taken; and
4. Date, time and weather conditions at the time the photograph is taken; and

eb. -When simulating the presence of proposed wind turbines, the following shall apply:

1. Turbines shall be placed with full frontal views and no haze or fog effect applied;

2. Turbines shall reasonably represent the shape of the intended turbines for a project including the correct hub height and rotor diameter;
3. Turbine blades shall be set at random angles with some turbines showing a blade in the 12 o'clock position; and
4. The lighting model used to render wind turbine elements shall correspond to the lighting visible in the base photograph;

(8) If the proposed facility is required by Federal Aviation Administration regulations to install aircraft warning lighting or if the proposed facility would include other nighttime lighting, a description and characterization of the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points; and

(9) A description of the measures planned to avoid, minimize, or mitigate potential adverse effects of the proposed facility, and of any visible plume that would emanate from the proposed facility, and the alternative measures considered but rejected by the applicant.

Site 301.06 Effects on Historic Sites. Each application shall include the following information regarding the identification of historic sites and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on historic sites:

(a) Demonstration that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9, as applicable;

(b) Identification of all historic sites and areas of potential archaeological sensitivity located within the area of potential effects, as defined in 36 C.F.R. §800.16(d), available as noted in Appendix B;

(c) Finding or determination by the division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, that no historic properties would be affected, that there would be no adverse effects, or that there would be adverse effects to historic properties, if such a finding or determination has been made prior to the time of application.

(d) Description of the measures planned to avoid, minimize, or mitigate potential adverse effects on historic sites and archaeological resources, and the alternative measures considered but rejected by the applicant; and

(e) Description of the status of the applicant's consultations with the division of historical resources of the department of cultural resources, and, if applicable, with the lead federal agency, and, to the extent known to the applicant, any consulting parties, as defined in 36 C.F.R. §800.2(c), available as noted in Appendix B.

Site 301.07 Effects on Environment. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment:

(a) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of air quality;

(b) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of water quality;

(c) Information regarding the natural environment, including the following:

- (1) Description of how the applicant identified significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility, including communications with and documentation received from the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources;
- (2) Identification of significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility;
- (3) Identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility;
- (4) Assessment of potential impacts of construction and operation of the proposed facility on significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, including fragmentation or other alteration of terrestrial or aquatic significant habitat resources;
- (5) Description of the measures planned to avoid, minimize, or mitigate potential adverse impacts of construction and operation of the proposed facility on wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, and the alternative measures considered but rejected by the applicant; and
- (6) Description of the status of the applicant's discussions with the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources.

Site 301.08 Effects on Public Health and Safety. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety:

(a) For proposed wind energy systems:

- (1) A sound impact assessment prepared in accordance with professional standards by an expert in the field, which assessment shall include the reports of a preconstruction sound background study and a sound modeling study, as specified in Site 301.18;
- (2) An assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area (~~outdoor and indoor~~), other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines;

(3) Description of planned setbacks that indicate the distance between each wind turbine and the nearest landowner's existing building and property line, and between each wind turbine and the nearest public road and overhead or underground energy infrastructure or energy transmission pipeline within 2 miles of such wind turbine, and explain why the indicated distances are adequate to protect the public from risks associated with the operation of the proposed wind energy facility;

(4) An assessment of the risks of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant;

(5) Description of the lightning protection system planned for the proposed facility;

(6) Description of any determination made by the Federal Aviation Administration regarding whether any hazard to aviation is expected from any of the wind turbines included in the proposed facility, and describe the Federal Aviation Administration's lighting, turbine color, and other requirements for the wind turbines;

(7) A decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in wind generation projects and cost estimates, which plan shall provide for removal of all structures and restoration of the facility site ~~with a description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials, including the provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;~~

(8) The decommissioning plan required under (7) above shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

ca. All turbines, including the blades, nacelles and towers, shall be disassembled and transported off-site;

See attached comment 6.

db. All transformers shall be transported off-site;

ec. The overhead power collection conductors and the power poles shall be removed from the site;

fd. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place; and

ge. Areas where subsurface components are removed shall be filled, graded to match adjacent contours, reseeded, stabilized with an appropriate seed and allowed to re-vegetate naturally;

(9) A plan for fire protection for the proposed facility prepared by or in consultation with a fire safety expert; and

(10) An assessment of the risks that the proposed facility will interfere with the weather radars used for severe storm warning or any local weather radars.

(b) For electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.

(c) For all energy facilities:

(1) Except as otherwise provided in (a)(1) above, an assessment of operational sound associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to increase sound by 10 decibel A-weighted (dBA) or more over background levels, (measured at the L-90 sound level,) at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

(2) A facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates; ~~which plan shall include a description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials, including the provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;~~ the decommissioning plan shall include each of the following:

See attached comment 6.

~~a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;~~

~~b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;~~

~~ca. All transformers shall be transported off-site; and~~

~~db. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place;~~

(3) A plan for fire safety prepared by or in consultation with a fire safety expert;

(4) A plan for emergency response to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Site 301.09 Effects on Orderly Development of Region. Each application shall include information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places, and the applicant's estimate of the effects of the construction and operation of the facility on:

- (a) Land use in the region, including the following:
 - (1) A description of the prevailing land uses in the affected communities; and
 - (2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;
- (b) The economy of the region, including an assessment of:
 - (1) The economic effect of the facility on the affected communities;
 - (2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;
 - (3) The effect of the proposed facility on State and tax revenues and the tax revenues of the host and regional communities;
 - (4) The effect of the proposed facility on real estate values in the affected communities;
 - (5) The effect of the proposed facility on tourism and recreation; and
 - (6) The effect of the proposed facility on community services and infrastructure;
- (c) Employment in the region, including an assessment of:
 - (1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and
 - (2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

Site 301.10 Completeness Review and Acceptance of Applications for Energy Facilities.

(a) Upon the filing of an application for an energy facility, the committee shall forward to each of the other state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, a copy of the application for the agency's review as described in RSA 162-H:7, IV.

(b) The committee also shall forward a copy of the application to the department of fish and game, the department of health and human services, the division of historical resources of the department of cultural resources, the natural heritage bureau, the governor's office of energy and planning, and the division of fire

safety of the department of safety, unless any such agency or office has been forwarded a copy of the application under (a) above.

(c) Upon receiving an application, the committee shall conduct a preliminary review to ascertain if the application contains sufficient information for the committee to review the application under RSA 162-H and these rules.

(d) Each state agency having permitting or other regulatory authority shall have 45 days from the time the committee forwards the application to notify the committee in writing whether the application contains sufficient information for its purposes.

(e) Within 60 days after the filing of the application, the committee shall determine whether the application is administratively complete and has been accepted for review.

(f) If the committee determines that an application is administratively incomplete, it shall notify the applicant in writing, specifying each of the areas in which the application has been deemed incomplete.

(g) If the applicant is notified that its application is administratively incomplete, the applicant may file a new and more complete application or complete the filed application by curing the specified defects within 10 days of the applicant's receipt of notification of incompleteness.

(h) If, within the 10-day time frame, the applicant files a new and more complete application or completes the filed application, in either case curing the defects specified in the notification of incompleteness, the committee shall, no later than 14 days after receipt of the new or completed application, accept the new or completed application.

(i) If the new application is not complete or the specified defects in the filed application remain uncured, the committee shall notify the applicant in writing of its rejection of the application and instruct the applicant to file a new application.

Site 301.11 Exemption Determination.

(a) Within 60 days of acceptance of an application or the filing of a petition for exemption, the committee shall exempt the applicant from the approval and certificate provisions of RSA 162-H and these rules, if the committee finds that:

(1) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives set forth in RSA 162-H:1;

(2) Consideration of the proposed energy facility by only selected agencies represented on the committee is required and the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H;

(3) Response to the application or request for exemption from the general public, provided through written submissions or in the adjudicative proceeding provided for in (b) below, indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(4) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

(b) The committee shall make the determination described in (a) above after conducting an adjudicative proceeding that includes a public hearing held in a county where the energy facility is proposed to be located.

Site 301.12 Timeframe for Application Review.

(a) Pursuant to RSA 162-H:7, VI-b, each state agency having permitting or other regulatory authority over the proposed energy facility shall report its progress to the committee within 150 days after application acceptance, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority;

(b) Pursuant to RSA 162-H:7, VI-c, each state agency having permitting or other regulatory authority over the proposed energy facility shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after application acceptance.

(c) Pursuant to RSA 162-H:7, VI-d, the committee shall issue or deny a certificate for an energy facility within 365 days after application acceptance.

(d) Pursuant to RSA 162-H:14, I, the committee shall temporarily suspend its deliberations and the time frames set forth in this section at any time while an application is pending before the committee, if it finds that such suspension is in the public interest.

Site 301.13 Criteria Relative to Findings of Financial, Technical, and Managerial Capability.

(a) In determining whether an applicant has the financial capability to construct and operate the proposed energy facility, the committee shall consider:

- (1) The applicant's experience in securing funding to construct and operate energy facilities similar to the proposed facility;
- (2) The experience and expertise of the applicant and its advisors, to the extent the applicant is relying on advisors;
- (3) The applicant's statements of current and pro forma assets and liabilities; and
- (4) Financial commitments the applicant has obtained or made in support of the construction and operation of the proposed facility.

(b) In determining whether an applicant has the technical capability to construct and operate the proposed facility, the committee shall consider:

- (1) The applicant's experience in designing, constructing, and operating energy facilities similar to the proposed facility; and
- (2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time.

(c) In determining whether an applicant has the managerial capability to construct and operate the proposed facility, the committee shall consider:

- (1) The applicant's experience in managing the construction and operation of energy facilities similar to the proposed facility; and
- (2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide managerial support for the construction and operation of the proposed facility, if known at the time.

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

- (1) The existing character of the area of potential visual impact;
- (2) The significance of affected scenic resources and their distance from the proposed facility;
- (3) The extent, nature, and duration of public uses of affected scenic resources;
- (4) The scope and scale of the change in the landscape visible from affected scenic resources;
- (5) The evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24;
- (6) The extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity; and
- (7) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures.

(b) In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall consider:

- (1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;
- (2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;
- (3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;
- (4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and

(5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

(c) In determining whether a proposed energy facility will have an unreasonable adverse effect on air quality, the committee shall consider the determinations of the New Hampshire department of environmental services with respect to applications or permits identified in Site 301.03(d) and other relevant evidence submitted pursuant to Site 202.24.

(d) In determining whether a proposed energy facility will have an unreasonable adverse effect on water quality, the committee shall consider the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, with respect to applications and permits identified in Site 301.03(d), and other relevant evidence submitted pursuant to Site 202.24.

(e) In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:

(1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;

(2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;

(4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(5) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on the affected wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and the extent to which such measures represent best practical measures;

(6) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on terrestrial or aquatic significant habitat resources, and the extent to which such measures represent best practical measures; and

(7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, (measured at the L-90 sound level,) between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBA above background levels, (measured at the L-90 sound level,) at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine; and

b. With respect to shadow flicker, the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area (~~outdoor and indoor~~), or other occupied building;

(3) For wind energy systems, consider the proximity and use of buildings, property lines, public roads, and overhead and underground energy infrastructure and energy transmission pipelines, the risks of ice throw, blade shear, tower collapse, and other potential adverse effects of facility operation, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures; and

(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures.

(g) In determining whether to grant a certificate of site and facility for a proposed wind energy facility, the committee shall consider cumulative impacts of or from multiple projects or multiple towers, or both, to public health and safety, natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including aesthetic impacts and sound impacts, and, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of energy facilities by the viewer.

Site 301.15 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:

(a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;

(b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and

(c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The welfare of the population;

See attached comment 1.

(b) Private property;

(c) The location and growth of industry;

(d) The overall economic growth of the state;

(e) The environment of the state;

(f) Historic sites;

(g) Aesthetics;

(h) Air and water quality;

(i) The use of natural resources; and

(j) Public health and safety.

~~(a) The beneficial and adverse environmental effects of the facility, including effects on air and water quality, wildlife, and natural resources;~~

~~(b) The beneficial and adverse economic effects of the facility, including the costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies;~~

~~(c) The extent to which construction and operation of the facility will be consistent with federal, regional, state, and local plans and policies, including those specified in RSA 378:37 and RSA 362-F:1;~~

~~(d) The municipal master plans and land use regulations pertaining to (i) natural, scenic, historic, and cultural resources, and (ii) public health and safety, air quality, economic development, and energy resources; and~~

~~(e) The extent to which siting, construction, and operation of the facility will have impacts on and benefits to the welfare of the population, the location and growth of industry, historic sites, aesthetics, the use of natural resources, and public health and safety, consistent with RSA 162-H:1.~~

Site 301.17 Conditions of Certificate. In determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H:

See attached comment 11.

(a) A requirement that the certificate holder promptly notify the committee of any proposed or actual change in the ownership or ownership structure of the holder or its affiliated entities and request approval of the committee of such change;

(b) A requirement that the certificate holder promptly notify the committee of any proposed or actual material change in the location, configuration, design, specifications, construction, operation, or equipment components of the energy facility subject to the certificate and request approval of the committee of such change;

(c) A requirement that the certificate holder continue consultations with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency, and comply with any agreement or memorandum of understanding entered into with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency;

(d) Delegation to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy facility subject to the certificate and to ensure that related terms and conditions of the certificate are met;

(e) Delegation to the administrator or another state agency or official of the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within the certificate and with respect to any permit, license, or approval issued by a state agency having permitting or other regulatory authority;

(f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;

See attached comment 4. 

(g) A requirement that the energy facility be sited subject to setbacks or operate with designated safety zones in order to avoid, mitigate, or minimize potential adverse effects on public health and safety;

(h) Other conditions necessary to ensure construction and operation of the energy facility subject to the certificate in conformance with the specifications of the application; and

(i) Any other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

Site 301.18 Sound Study Methodology.

(a) The methodology for conducting a preconstruction sound background study for a wind energy system shall include:

- (1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B-standard, a standard that requires short-term attended measurements;
- (2) Long-term unattended monitoring shall be conducted in accordance with the standard of ANSI S12.9-1992 2013 Part 2, available as noted in Appendix B-standard, provided that audio recordings are taken in order to clearly identify and remove transient noises from the data, with frequencies above 1250 hertz 1/3 octave band to be filtered out of the data;

(3) Measurements shall be conducted at the nearest properties from the proposed wind turbines that are representative of all residential properties within 2 miles of any turbine; and

(4) Sound measurements shall be omitted when the wind velocity is greater than 4 meters per second at the microphone position, when there is rain, or with temperatures below instrumentation minima; following the protocol of ANSI S12.9-2013 Part 3, available as noted in Appendix B: protocol;

a. Microphones shall be placed 1 to 2 meters above ground level, and at least 7.5 meters from any reflective surface;

b. A windscreen of the type recommended by the monitoring instrument's manufacturer must be used for all data collection;

c. Microphones should be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone.

(b) Pre-construction sound reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points;

(3) Distance between any sound measurement point and the nearest wind turbine;

(4) Location of significant local non-turbine sound and vibration sources;

(5) Distance between all sound measurement points and significant local sound sources;

(6) Location of all sensitive receptors including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities;

(7) Indication of temperature, weather conditions, sources of ambient sound, and prevailing wind direction and speed for the monitoring period; and

(8) Final report shall provide A-weighted and C-weighted sound levels for L-10, Leq, and L-90.

(c) The predictive sound modeling study shall:

(1) Be conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15, available as noted in Appendix B: standards and specifications;

(2) Include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty, such adjustment to be determined in accordance with the most recent release of the IEC 61400 Part 11 standard (Edition 3.0 2012-11), available as noted in Appendix B;

(3) Include predictions to be made at all properties within 2 miles from the project wind turbines for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day; and

(4) Incorporate other corrections for model algorithm error to be disclosed and accounted for in the model.

(d) The predictive sound modeling study report shall:

- (1) Include the results of the modeling described in (c)(3) above as well as a map with sound contour lines showing dBA sound emitted from the proposed wind energy system at 5 dBA intervals;
- (2) Include locations out to 2 miles from any wind turbine included in the proposed facility; and
- (3) Show proposed wind turbine locations and the location of all sensitive receptors, including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities;

(e) Post-construction noise compliance monitoring shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, standard that requires short-term attended measurements to ensure transient noises are removed from the data, and; measurements shall include at least one nighttime hour where turbines are operating at full sound power with winds less than 3 meters per second at the microphone;

(2) Unattended long-term monitoring shall also be conducted;

(3) Sound measurements shall be omitted when there is rain, or when temperatures are below instrumentation minima, and shall comply with the following additional specifications;

a. Microphones shall be placed 1 to 2 meters above ground level and at least 7.5 meters from any reflective surface, following the protocols of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B-protocols;

b. Proper microphone screens shall be required;

c. Microphones shall be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone;

(4) Monitoring shall involve measurements being made with the turbines in both operating and non-operating modes, and supervisory control and data acquisition system data shall be used to record hub height wind speed and turbine power output;

(5) Locations shall be pre-selected where noise measurements will be taken that and shall be the same locations at which predictive sound modeling study measurements were taken pursuant to subsection (c) above, and the; measurements shall be performed at night with winds above 4.5 meters per second at hub height and less than 3 meters per second at ground level;

(6) All sound measurements during post-construction monitoring shall be taken at 0.125-second intervals measuring both fast response and Leq metrics; and

(7) Post-construction monitoring surveys shall be conducted once within 3 months of commissioning, and once during each season thereafter for the first year, provided that:

~~a.~~ a Additional surveys shall be conducted at the request of the committee or the administrator; and

~~b.~~ a Adjustments to this schedule shall be permitted, subject to review by the committee or the administrator.

(f) Post-construction sound monitoring reports shall include a map or diagram clearly showing the following:

- (1) Layout of the project area, including topography, project boundary lines, and property lines;
- (2) Locations of the sound measurement points; and
- (3) Distance between any sound measurement point and the nearest wind turbine.

(g) For each sound measurement period during post-construction monitoring, reports shall include each of the following measurements:

- (1) LAeq, LA-10, and LA-90; and
- (2) LCEq, LC-10, and LC-90.

(h) Noise emissions shall be free of audible tones, and if the presence of a pure tone frequency is detected, a 5 dB penalty shall be added to the measured dBA sound level.

(i) Validation of noise complaints submitted to the committee shall require field sound surveys, except as determined by the administrator to be unwarranted, which field studies shall be conducted under the same meteorological conditions as occurred at the time of the alleged exceedance that is the subject of the complaint.

SITE 302 ENFORCEMENT OF TERMS AND CONDITIONS

Site 302.01 Determination of Certificate Violation.

(a) Whenever the committee or the administrator as designee determines, on its own or in response to a complaint, that any term or condition of an issued certificate is being violated, it shall give written notice to the person holding the certificate of the specific violation and order the person to immediately terminate the violation.

~~(b) The administrator or another designated representative of the committee shall have the authority to inspect and monitor the construction and operation of the energy facility subject to the certificate for purposes of inspection and monitoring by the administrator or another authorized representative of the committee.~~

(c) If the person holding the certificate has failed or neglected to terminate a specified violation within 15 days after receipt of the notice and order issued pursuant to (a) above, the committee shall commence a proceeding to suspend the person's certificate.

↑
See attached comment 12.

(d) Except in the case of an emergency, the committee shall give written notice of its consideration of suspension and of its reasons for consideration of suspension and shall provide an opportunity for an adjudicative hearing pursuant to Site 201 with respect to the proposed suspension.

(e) Except in the case of an emergency, the committee shall provide 14 days prior written notice of the hearing referred to in (d) above to the holder of the certificate and to the complainant, if any.

(f) Pursuant to RSA 162-H:12, I, if the committee determines following the adjudicative hearing that a certificate violation has occurred and is continuing, the committee may issue an order that suspends the holder's certificate until such time as the violation has been corrected.

Site 302.02 Determination of Misrepresentation or Non-Compliance.

(a) If the committee determines that a person has made a material misrepresentation in the application or in any supplemental or additional statements of fact or studies required of the applicant, or if the committee determines that the person has violated the provisions of RSA 162-H or the rules of the committee, the committee shall commence an adjudicative proceeding to suspend the certificate held by such person.

(b) Except in the case of an emergency, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide an opportunity for an adjudicative hearing pursuant to Site 201 with respect to the proposed suspension.

(c) Except in the case of an emergency, the committee shall provide 14 days prior written notice of the hearing referred to in (b) above to the holder of the certificate.

(d) Pursuant to RSA 162-H:12, II, if the committee determines following the adjudicative hearing that a material misrepresentation or violation of RSA 162-H or its rules has occurred, the committee may issue an order that suspends the holder's certificate until such time as the holder has corrected and mitigated the consequences of such misrepresentation or violation.

(e) If the holder's certificate is suspended by order of the committee, then the holder shall cease construction or operation of the energy facility subject to the certificate as of the time specified in the order, and shall not resume construction or operation of the facility until such time as the suspension is lifted by further order of the committee.

See attached comment 9.

Site 302.03 Revocation of Certificate.

(a) The committee shall have the authority to revoke a certificate according to this section.

(b) If the committee has suspended a certificate pursuant to Site 302.01 or Site 302.02 and the holder has failed to correct and mitigate the consequences of the violation or misrepresentation that was the basis for the suspension within the period of time specified in the suspension order, the committee shall initiate an adjudicative proceeding to revoke the suspended certificate and shall conduct an adjudicative hearing prior to determining whether to revoke the certificate.

(c) The committee shall provide 90 days prior written notice to the holder of the certificate that the committee intends to revoke the certificate and stating the reasons for the intended revocation.

(d) If the holder's certificate is revoked by order of the committee, then the holder shall permanently cease construction or operation of the energy facility subject to the certificate as of the time specified in the order and shall commence and complete decommissioning of the facility within the time period specified in the order.

Site 302.04 Emergencies.

(a) For the purposes of this part, “emergency” means an event which jeopardizes public health and safety.

(b) With respect to emergencies, the committee shall provide 5 days prior written notice of an adjudicative hearing to the holder of a certificate.

Site 302.05 Waiver of Rules.

(a) The committee or subcommittee, as applicable, shall waive any of the provisions of this chapter, except where precluded by statute, on its own motion or upon request by an interested party, if the committee or subcommittee finds that:

(1) The waiver serves the public interest; and

(2) The waiver will not disrupt the orderly and efficient resolution of matters before the committee or subcommittee.

(b) In determining the public interest, the committee or subcommittee shall waive a rule if:

(1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or

(2) The purpose of the rule would be satisfied by an alternative method proposed.

(c) Any interested party seeking a waiver shall make a request in writing, except as provided in (d) below.

(d) The committee or subcommittee, as applicable, shall accept for consideration any waiver request made orally during a hearing or prehearing conference.

(e) A request for a waiver shall specify the basis for the waiver and the proposed alternative, if any.

APPENDIX A

Rule	Statute
Site 205.01	RSA 162-H:10,VI and VII; RSA 541-A:11, VII
Site 301.01-02	RSA 162-H:7,II, 10,VI and VII
Site 301.03	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.04	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.05	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.06	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.07	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.08	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.09	RSA 162-H:7,IV and V, 10,VI and VII
Site 301.10	RSA 162-H:7,IV and VI, 10,VI and VII
Site 301.11	RSA 162-H:4, IV, 10,VI and VII
Site 301.12	RSA 162-H:7, VI-b, VI-c and VI-d, 10,VI and VII, 14, I
Site 301.13	RSA 162-H:10,VI and VII, 16, IV(a)
Site 301.14	RSA 162-H:10,VI and VII, 10-a, 16, IV(c)
Site 301.15	RSA 162-H:10,VI and VII, 16, IV(b)
Site 301.16	RSA 162-H:10,VI and VII, 16, IV(e)
Site 301.17	RSA 162-H:10, VI and VII
Site 301.18	RSA 162-H:7, V, 10, VI and VII
Site 302.01-04	RSA 162-H:10,VI and VII, 12
Site 302.05	RSA 162-H:10,VI and VII; RSA 541-A:22, IV

APPENDIX B: INCORPORATION BY REFERENCE INFORMATION

RULE	TITLE/CITATION (DATE)	SOURCE
Site 301.06(b)	36 C.F.R. §800.16(d) (2014)	Available from U.S. Government Publishing Office, http://www.gpo.gov
Site 301.06(e)	36 C.F.R. §800.2(c) (2014)	Available from U.S. Government Publishing Office, http://www.gpo.gov
Site 301.18(a)(1), (a)(4), (e)(1), and (e)(3)	ANSI/ASA S12.9-2013 Part 3 Quantities and Procedures for Description and Measurement of Environmental Sound – Part 3: Short-term Measurements with an Observer Present	Published by American National Standards Institute, 25 West 43 rd Street, 4 th Floor, New York, NY 10036 Hard copy or electronic copy can be purchased for \$115.00 at: http://webstore.ansi.org
Site 301.18(a)(2)	ANSI/ASA S12.9-1992 2013 Part 2, Quantities and Procedures for Description and Measurement of Environmental Sound. Part 2: Measurement of long-term, wide-area sound	Published by American National Standards Institute, 25 West 43 rd Street, 4 th Floor, New York, NY 10036 Hard copy or electronic copy can be purchased for \$100.00 at: http://webstore.ansi.org
Site 301.18(c)(1)	ISO 9613-2 1996-12-15, Acoustics - Attenuation of sound during propagation outdoors - Part 2: General method of calculation	Published by International Organization for Standardization, Case Postale 56, CH-1211, Geneve 20, Switzerland Hard copy or electronic copy can be purchased for \$123.00 at: http://webstore.ansi.org
Site 301.18(c)(2)	IEC 61400 Part 11 (Edition 3.0 2012-11), Wind turbines – Part 11: Acoustic noise measurement techniques	Published by International Electrotechnical Commission, 3, rue de Varembe, CH-1211, Geneva 20, Switzerland Hard copy or electronic copy can be purchased for \$303.00 at: http://webstore.ansi.org