

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

APPLICATION OF GROTON WIND, LLC
NO. 2010-01

REPLY MEMORANDUM OF COUNSEL FOR THE PUBLIC

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this Reply Memorandum of Law in accordance with the Presiding Officer's "Procedural Order and Notice of Possible Suspension of Certificate of Site and Facility, dated November 4, 2013 (the "Order and Notice").

In his opening Memorandum of Law, dated December 4, 2013, Counsel for the Public urged the Committee to answer question one in the negative and question two in the affirmative. Counsel for the Public submits this Reply Memorandum to address issues raised in the Opening Brief of Groton Wind LLC, filed December 4, 2013 (the "GW Opening Brief").

Groton Wind's Opening Memorandum is indicative of its overall response to the problem it created. It refuses to acknowledge that it has done anything wrong, it mis-characterizes the Committee's orders in ways to suit its position, *see* Opening Brief, p. 2, and it denies plain reality, with a continued implausible insistence that the changes it unilaterally took were "minor."

In support hereof, Counsel for the Public respectfully represents as follows:

ARGUMENT

1. The Changes Were Not Minor.

Groton Wind has repeatedly stated that the Committee should not act or be concerned about this problem because the changes it undertook without the Committee's consideration or authorization were minor. There is no exception in the statute for minor changes. Nevertheless, even if there were, the changes made to the plans were not minor.

The relocation of the Northeast turbine string access road involved a considerable stretch of access road along the ridgeline and grater wetlands impacts. Looking at the plans, one can estimate that approximately 1,000 feet of new and unapproved roadway were constructed. Up on the ridge, the realignment doubled the impact of the project on a vernal pool near WT 3. See P. Walker to R. Pelletier, Letter dated, Nov. 10, 2011, p. 3. Revised Plans, C-5.3.

The new design resulted in realigning 600 feet of Groton Hollow Road, after an unequivocal assurance at the hearing that there would be no changes to the road. See Walker Letter, p. 3; Transcript, Nov. 1, 2010, AM, pp. 75-77 (testimony of Mr. Cherian); Transcript, June 28, 2010, p. 85 (remarks of Mr. Cherian).

Of gravest concern is the complete relocation of the O&M Building. The building sits up on a leveled terrace rising 30-40 feet above Groton Hollow Road, surrounded by a tall chain link fence with wire, and covering, with parking, the

terrace, septic, and storm drainage, approximately 100,000 ft. sq.¹ As approved the O&M Building was planned to be located some distance away from the road, on the opposite side of Clark Brook and screened by dense forest cover. Building a Wal-Mart sized facility, the toe of which is feet from the end of Mr. Rampino's driveway, can in no stretch of the imagination be considered a minor change.

Finally, Groton Wind suggests that because the Wal-Mart sized O&M facility was going to the same place as the previously relocated switchyard, that this somehow provides an environmental benefit. GW Opening Brief, p. 7. As noted by Groton Wind, *id.*, n. 5, it was already established that the switchyard would be elsewhere. When the certificate was issued the Committee and the residents of Groton Hollow had every reason to believe that the switchyard location would be empty woodland, not a densely developed, heavily used industrial site. Thus, the tradeoff is not switchyard for O&M facility, but instead, unused wooded parcel for O&M facility.

2. Groton Wind's Reliance On DES Approvals Cannot Be Reconciled With The Unambiguous Mandate Of RSA 162-H:5.

While it appears highly unlikely that the Committee intended to authorize DES to approve anything other than changes to wetlands and other permits it issued, even if it had, it does not appear that Groton Wind in fact requested

¹ By comparison, a standard sized Wal-Mart building is approximately 100,000 ft.² The Super-Center in Plymouth NH is reportedly 150,000 ft.² *See Wal-Mart Real Estate Business Trust v. Town of Plymouth*, NH Brd. of Tax & Land App., No. 21720-05PT, Decision dated 1/29/10.

anything more than that. On November 3, 2011, Groton Wind's consultant sent an email to DES seeking a meeting to discuss "revised plans" and to meet construction personnel. Email dated Nov. 3, 2011, from Peter Walker to Craig Rennie. Mr. Rennie agreed and it appears that Groton Wind's wetlands consultants met with DES on November 10, 2011. Email dated Nov. 7, 2011 from Craig Rennie to Peter Walker. Mr. Walker drafted a letter to Rene Pelletier at DES and hand delivered it on November 10, 2011. With this letter came revised wetlands and terrain alteration information. Letter dated Nov. 10, 2011, P. Walker to R. Pelletier (four pages with attachments). The content of this letter shows quite clearly that Groton Wind only sought wetlands and alteration of terrain changes. First, the only impacts of the changes that are discussed concern wetlands and alteration of terrain permit issues, other sorts of concerns that the changes might implicate under RSA 162-H:16 are not mentioned at all. Second, there is no mention of any changes to the terms and conditions of the Certificate. Third, Mr. Walker's letter makes specific reference to changes that had been "presented and approved as part of the SEC proceedings" indicating his awareness of the requirement of SEC approval. Finally, the letter makes no argument about the statutory criteria and the relationship of the indicated wetlands and terrain alteration changes to the SEC criteria. All of these factors indicate very persuasively that Groton Wind in its autumn 2011 wetlands permit modification request did not seek a proxy SEC approval for the relocation of the O&M Building or the access road.

On December 5, 2011, DES approved the wetlands and AoT permit changes requested. Its Wetlands Bureau Permit and Alteration of Terrain Bureau Permit Amendments, both dated December 5, 2011, do not mention approval of anything except the changes to the wetlands and AoT conditions. The AoT Amendment expressly says that the “permit does not relieve the applicant of the obligation to obtain other local, state or federal permits that may be required.”

In addition, even Groton Wind’s reliance on a DES determination may be untenable. It appears to be certain that the construction of the O&M facility and the Northeast Access Road both deviated more than 100’ from their originally proposed and approved locations. Under unambiguous DES rules, such a deviation should have triggered a requirement that a new permit application be submitted for full review. *See* N.H. Admin. R. Env-wq 1503.21 and 1503.22². As such, it cannot be said that these changes should have been approved, as they required the submittal of a new AOT permit application or a request for a waiver – neither of which was done.

Finally, it is noteworthy that at no time has Groton Wind alleged to the Committee that it was *in fact* seeking to have DES act as proxy for the Committee in approving the wetlands and AoT permit changes. *See* Opening Brief, p. 8; Letter

² If the facility is moved less than 20 feet nothing need be done. 1503.21(d). If the facility is moved more than 20 but less than 100 feet an amendment to the permit may be obtained. However, if the facility is moved more than 100 feet (as was the case here) the rules do not allow for an amended permit and a new application must be submitted. 1503.22(a) and (c).

of Susan S. Geiger, Esq, to the Chairman, dated January 16, 2013; Transcript of Hearing, dated Feb. 19, 2013 at 97-160 (arguments presented by Ms Geiger).

Instead, Groton Wind argues that the Decision and Order created a process, that Groton Wind's requests to DES were consistent with that process, and therefore that it should not be penalized. Groton Wind does not, however, claim that it in fact intended that its DES submittals should be sufficient. At this point, apparently conceding the point that the statute does not allow DES to authorize certificate changes, Groton Wind now argues that the certificate remains unchanged and no changes were ever necessary. Opening Brief, p. 8; *but see* Transcript, 3/25/13, p. 101 (“given our position on the manner in which the O&M building was constructed, in terms of obtaining approval through DES, as required by the certificate,...”); Transcript, 2/19/13, p. 118-125 (making argument that DES permits were conditions to certificate and Committee gave DES authority to change those). Groton Wind does not explain how DES could authorize significant changes to the site plans without changing the terms of the certificate when construction in accordance with the earlier site plans was a condition of the certificate. Perhaps it is by its erroneous and heavy reliance on the assertion that the changes were not significant and were minor that it can wish away the conditions of the certificate and the clear mandate of RSA 162-H:5 –“Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate.” However, the terms of this owner's certificate required the O&M facility and the other project

components to be located and constructed in accordance with the plans last before the Committee on May 6, 2011.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

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Dated: January 6, 2014

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CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that I served the foregoing upon the parties by email.

January 6, 2014

/s/ Peter C.L. Roth
Peter C.L. Roth