



**Upton
& Hatfield**^{LLP}
ATTORNEYS AT LAW

Concord Office

10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Attorneys At Law

Gary B. Richardson
John F. Teague
James F. Raymond
Barton L. Mayer
Charles W. Grau
Bridget C. Ferns
Heather M. Burns
Lauren Simon Irwin
Matthew R. Serge
Michael S. McGrath*
Marilyn Billings McNamara
Lisa M. Hall
James A. O'Shaughnessy

Hillsborough Office

8 School Street
PO Box 13
Hillsborough, NH
03244-0013
603-464-5578
1-800-672-1326
Fax 603-464-3269

Attorneys At Law

Douglas S. Hatfield
Margaret-Ann Moran
Steven J. Venezia*

North Conway Office

23 Seavey Street
PO Box 2242
North Conway, NH
03860-2242
603-356-3332
Fax 603-356-3932

Attorney At Law

Robert Upton, II

Portsmouth Office

159 Middle Street
Portsmouth, NH 03801
603-436-7046
1-877-436-6206
Fax 603-369-4645

Attorneys At Law

Russell F. Hilliard
Justin C. Richardson

Please respond to the Portsmouth office

January 6, 2014

Via Electronic and U.S. Mail

Jane Murray, Secretary
NH Site Evaluation Committee
New Hampshire Department of Environmental
Services
29 Hazen Drive
Concord, NH 03301

Re: Application of Groton Wind, LLC
Docket No. 2010-01

Dear Ms. Murray:

Enclosed please find for filing an original and one copy of *Reply Memorandum of Mario Rampino*.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Justin C. Richardson

jrichardson@uptonhatfield.com

JCR/sem

Enclosure(s)

cc: Service List (w/ enclosure)(via electronic mail)
Mario Rampino, Jr. (w/ enclosure)

www.uptonhatfield.com
law@uptonhatfield.com

*Also admitted in MA

BEFORE THE
STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2010-01

*Application of Groton Wind, LLC for a Certificate of Site and Facility
for a Renewable Energy Facility in Groton, N.H.*

REPLY MEMORANDUM OF MARIO RAMPINO

NOW COMES Mario Rampino, by and through Upton & Hatfield, LLP, offers the following Reply Memorandum (Responsive Brief) pursuant to the November 4, 2013 Procedural Order:

I. RESPONSE TO GROTON WIND, LLC

A. Groton Wind, LLC Misreads its NHDES Permits.

After a confusing explanation of the Committee's Question 1 ("Did the Department of Environmental Services have the authority to modify the Certificate regarding the placement of the O&M building and the turbines?"), Groton Wind, LLC argues that its Wetlands and Alteration of Terrain Permits included conditions which authorized the NHDES to modify its certificate. Groton Wind, LLC relies on two conditions which state:

- Wetlands Condition #2: "[p]rior to construction, any plan revisions or changes *in construction details or sequences* shall be submitted to DES for review and approval"
- AoT Condition #4: "[r]evised plans shall be submitted for an amendment approval prior to any changes *in construction details or sequences.*"

See Opening Brief, Page 3 (emphasis added).

Groton Wind, LLC misreads its permits conditions. Both permit conditions are clearly limited to “construction details or sequences”. The NHDES permits do not even remotely suggest that the NHDES could (or believed it could) approve changes to the location of the project location which is governed by the certificate issued under RSA 162-H. Under RSA 482-A:3 and RSA 485-A:17, the NHDES’s authority is limited to regulation and protection of water quality, wetlands and erosion control “details or sequences”.

The Committee’s Decision clearly recognizes the limited nature of the NHDES’s approvals. For example, the Committee observed that the AoT Program regulates “activity that involves construction that significantly alters terrain characteristics in such a manner as to impede natural runoff or create an unnatural runoff.” Decision, Page 19. It is not a substitute for the consideration of alternatives by the Committee under RSA 162-H. The following passage from the Committee’s Decision is also instructive because it recognizes the critical distinction between regulation of “construction practices” in the NHDES permits, and the regulation of an energy facility in the certificate approved under RSA 162-H. The Committee stated:

Having considered the testimony of all witnesses, exhibits, and taking into account the comprehensive process employed by the Department of Environmental Services in its consideration and issuance of a Wetlands Permit and Alteration of Terrain Permit, the Subcommittee finds that the Project will not have an unreasonable adverse effect on **air or water quality**. Each of the aforementioned **permits shall become a condition of Certificate** in this docket. The Department of Environmental Services is hereby **delegated the authority to monitor the project and its compliance with conditions of the Certificate and with all laws and regulations pertaining to the permits that it has issued**. The Department of Environmental Services is hereby delegated the authority to specify the use of any technique, methodology, practice or procedure **as may be necessary to effectuate the provisions of this Certificate, however, any action to enforce the provisions of the Certificate must be brought before the Site Evaluation Committee**. See, RSA 162-H: III, III-a.

Groton Wind, LLC’s argument that the NHDES permit conditions authorized it to make material changes to the certificate is clearly in conflict with RSA 162-H and the Committee’s decision

which limited delegation to the NHDES to the “laws and regulations pertaining to the permits” – not a broader authority to modify the certificate. It is an absurd argument that is being used as cover what likely happened in truth. Groton Wind, LLC determined that it was better to ask for forgiveness than permission. It has built a project it was not authorized to build by its certificate, which has allowed it to reap financial benefits, to the detriment of Mr. Rampino and others. Its certificate should therefore be suspended or revoked, pending the approval process required by RSA 162-H. Otherwise, future applicants will make a similar determination, and simply propose one project, avoid scrutiny during the hearings process by the Committee, the public (including counsel for the public), and then build a cheaper and faster version of its project having greater impacts on the public.

B. Groton Wind, LLC’s Remaining Arguments Concerning the Unauthorized Changes to its Project Are Unconvincing.

Groton Wind, LLC’s remaining arguments concerning the unauthorized changes to its project suffer from the same problem: the Committee delegated to the NHDES the authority to specify changes to the permits. It withheld authority to specify changes to the certificate, as RSA 162-H requires. *See e.g.* RSA 162-H:4, III (The Committee “may not delegate authority to hold hearings, issue certificates, determine the terms and conditions of a certificate, or enforce a certificate.”); RSA 162-H:5, I (“Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate.”).

As a result, Groton Wind, LLC is required to submit an “after-the-fact” application for the Committee’s review as provided by RSA 162-H. Groton Wind, LLC has attempted to make the law or its permits appear to be ambiguous in order to make its own actions appear to be reasonable, but they are not. The law is clear and – if Groton Wind, LLC had any doubts as to its

authority to make major changes to its project – it could have asked the NHDES, the Committee, its counsel, the Attorney General, or any number of officials for an interpretation. It apparently did not do so, perhaps reasoning that it is easier to ask for forgiveness than permission. While that may be true *from a financial perspective* for an investor hoping to construct a project as quickly as possible to maximize returns, from a legal perspective it is not allowed as RSA 162-H requires a certificate application for sizeable changes to a facility such as in this case. It is therefore entirely within the Committee’s discretion to suspend or revoke Groton Wind, LLC’s certificate, pending review of the material changes to the project that were constructed in violation of its certificate as required by RSA 162-H.

C. Groton Wind Misreads the Law Concerning State Building and Fire Safety Codes Enforced by the State Fire Marshal.

Groton Wind, LLC argues that: “The SEC, not the State Fire Marshal, has authority to regulate the Groton Wind Project.” This bold argument is flatly contradicted by the provisions of RSA 162-H. First, the Committee’s authority to issue a certificate is *contingent upon and subordinate to state agency approvals*. RSA 162-H:16, I provides that “the committee shall not issue any certificate under this chapter if any of the other state agencies denies authorization for the proposed activity over which it has jurisdiction.” If an agency denies approval of a project, the Committee itself cannot approve it. While RSA 162-H:16 may pre-empt municipal land use approvals, it does not pre-empt those of state agencies or state officials. Furthermore, the law is clear that all state agencies retain their statutory powers of enforcement as RSA 162-H:12, IV provides that: “[n]otwithstanding any other provision of this chapter, *each of the other state agencies having jurisdiction shall retain all of its powers and duties of enforcement.*” (emphasis

added). The Committee's *additional authority* to require a certificate has no relevance to the State Fire Marshal can enforce State Building and Fire Codes!

Furthermore, RSA 162-H places the burden on the applicant to obtain the necessary permits. For example, RSA 162-H:7, IV requires that: "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.*" (emphasis added). An applicant cannot fail to apply for a necessary approval (or misrepresent that approval was waived or not required) and then use that failure as a defense against enforcement. RSA 162-H:7, IV and, by reference, RSA 162-H:6-a, place the burden on the applicant to apply for and obtain all the necessary permits. If an applicant fails to obtain the necessary state agency permits, the Committee cannot issue a certificate. RSA 162-H:16, IV.

D. Groton Wind Misreads the State Fire Marshall's Statutory Authority.

The State Fire Marshal's authority over the project is clear: Under RSA 155-A:2, I, "All buildings, building components, and structures constructed in New Hampshire shall comply with the state building code and state fire code." RSA 155-A:4, I, further requires that: "Before starting new construction ... the person responsible for such construction shall obtain a permit."

Groton Wind argues that it obtained 'approval' at the local level in a hand-written letter that makes no reference to the relevant codes or any relevant authority. This argument is absurd on many levels. First, local building codes are adopted as amendments to local zoning authority. *See e.g.* RSA 675:1, II. "building codes proposed under RSA 674:51 *shall be adopted in accordance with the procedures required under RSA 675:2-5.*" (emphasis added); RSA 674:34 (appeals of local codes to the local "Building Code Board of Appeals"); RSA 674:51. Groton

Wind, LLC's argument that local officials and approvals trump review under the State codes is troubling, if not meddlesome, to the purposes and provisions articulated in RSA 162-H. Could local municipal officials, in a hand written letter as Groton Wind, LLC has presented, exercise the power deny or issue a cease and desist order to any energy facility project under locally adopted fire and building codes? Such would appear to be precisely the opposite of what RSA 162-H:16 provides.

The Fire Marshal's authority is broad. Under RSA 153:4-a "[t]he state fire marshal shall be responsible for supervising and enforcing *all laws of the state relative to the protection of life and property from fire, fire hazards and related matters*" (emphasis added). This includes the power of "[e]nforcement of the state fire code." RSA 153:8-a, II. Thus, even if local officials have some approval authority under locally adopted fire or building codes, as Groton Wind, LLC now argues, the State Fire Marshal could still take enforcement action against the project for violations of the State code as RSA 162-H:12 expressly recognizes. There are numerous other provisions in RSA 153, RSA 154 or RSA 155-A that allow the State Fire Marshal to step in and enforce state codes. To the extent that doubt exists, RSA 153:25 is clear that it must be resolved in favor of the State Fire Marshal's authority, which is to be ***broadly construed*** as follows:

RSA 153:25 Construction of Chapter. – *It is hereby declared that this chapter is necessary for the public safety, health, peace and welfare, is remedial in nature, and shall be construed liberally, and shall not be declared unconstitutional or void for the reason that any section or provision thereof may be in contravention of the constitution. Should any provision or section hereof be held to be invalid for any reason, such holding shall not be construed as affecting the validity of the remaining portion of such section or sections hereof, it being the legislative intent that this chapter shall stand, notwithstanding the invalidity of any such provision or section.*

Groton Wind, LLC asks this Committee to read provisions in the State fire and building code statutes in isolation while ignoring those provisions that give the State Fire Marshal the

express authority to enforce State building and fire codes, a power reserved to the Fire Marshal by RSA 162-H:12. To the extent ambiguity any may be found as Groton Wind, LLC seeks to argue, RSA 153:25 requires that it be resolved in favor of the State Fire Marshal's express authority to enforce the State Fire and Building Codes to protect public safety.

II. CONCLUSION

Groton Wind, LLC's *Opening Brief* consistently misconstrues the law which requires that this Committee, the NHDES and the State Fire Marshal, approve or deny its project only as part of the comprehensive process under RSA 162-H. The law is clear that all state agencies retain their respective enforcement authority (RSA 162-H:12) while the Committee is the sole agency that can approve a certificate which governs the location and other aspects of the project as an energy facility, and may specify any alternatives. Groton Wind, LLC presents no convincing explanation for its failure to comply with its certificate, as RSA 162-H and its plainly require.

Groton Wind, LLC has ignored the plain and ordinary reading of the law, its certificate, and its NHDES permits, in order to build a project having a substantially greater impact on residential areas, including Mr. Rampino's property. It has avoided the costs to build the project in its proper location. It avoided the costs and delays required to hold hearings and obtain review and approval of its location, which is some 700 feet and across a major brook from the location approved by the Committee. It has avoided scrutiny by the Committee, counsel for the public, and members of the public, who are entitled by law to present comments and testimony before the Committee, which the Committee is required by law to consider. RSA 162-H:10, III. As a result, Groton Wind, LLC has constructed an unauthorized industrial maintenance and hazardous waste facility in a remote, rural, forested area that has contaminated Mr. Rampino's well with sediments and storm water. *See Photos*, attached. It is a project that the Committee would likely

have never approved. Protections afforded the public by law have been swept aside, while Groton Wind, LLC has realized significant financial benefits by constructing a building that neither the Committee nor the State Fire Marshall approved.

Mario Rampino asks that the Committee uphold RSA 162-H as written and suspend or revoke Groton Wind, LLC's certificate, pending the review and public hearing process under RSA 162-H and which requires that State Agency approvals such as for alteration of terrain, the siting of a hazardous waste facility or compliance with State Building and Fire Codes, be brought before the Committee before a certificate can be issued.

Respectfully submitted,

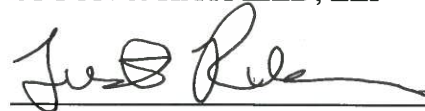
MARIO RAMPINO

By His Counsel,

UPTON & HATFIELD, LLP

Date: January 6, 2013

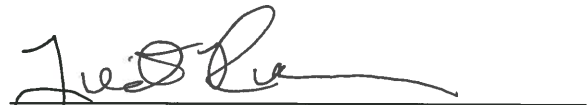
By:



Justin C. Richardson (NHBA 12148)
159 Middle Street
Portsmouth, New Hampshire 03801
(603) 436-7046
jrichardson@uptonhatfield.com

CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Committee's Service List in this proceeding.


Justin C. Richardson



Camera Location: 4/22/2013 Lat=N43 46' 30.68" Lon=W071 47' 40.42"



Camera Location: 4/22/2013 Lat=N43 46' 30.03" Lon=W071 47' 30.32"