Orr&Reno

January 6, 2014

Via Hand Delivery and Electronic Mail
NH Site Evaluation Committee
c/o Jane Murray, Secretary
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095

Re: Docket 2010-01, Groton Wind, LLC

Dear Ms. Murray:

Enclosed for filing with the Site Evaluation Committee in the above-captioned docket, please find an original and 15 copies of Groton Wind, LLC's Reply Brief.

Please contact me if there are any questions about these filings. Thank you for your assistance.

Very truly yours,

S. S. Geiger

Susan S. Geiger

cc: Service List (electronic mail only)
Enclosures
1099379_1

THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

DOCKET NO. 2010-01

Application of Groton Wind, LLC
for a Certificate of Site and Facility

REPLY BRIEF OF GROTON WIND, LLC

NOW COMES Groton Wind, LLC ("Groton Wind"), by and through its undersigned attorneys, and replies to the opening memoranda filed by Counsel for the Public and Mario Rampino, and the letter filed by Ms. Marianne Peabody by stating as follows:

I. INTRODUCTION

Groton Wind's Opening Brief filed in this docket on December 4, 2013 is hereby incorporated into the within Reply Brief by reference.

II. THE SUBCOMMITTEE'S ORDER AND CERTIFICATE, AS WELL AS ITS DECISION, ARE FINAL AND CANNOT BE CHALLENGED AT THIS TIME.

Both Counsel for the Public and Mr. Rampino raise issues under the Order and Certificate (May 6, 2011) and Decision (May 6, 2011) that are plainly time-barred. More specifically, to the extent that Public Counsel and Mr. Rampino challenge the Subcommittee's delegation of authority to the Department of Environmental Services ("DES") to review and approve site plan revisions or the Subcommittee's rejection of the State Fire Marshal's proposed certificate conditions, those challenges are untimely. Any disagreement with Subcommittee's decisions included the Subcommittee's Order and

Certificate, as well as its Decision must have been raised within the 30 day rehearing period set forth in RSA 541:3. The failure to previously raise these issues is fatal and cannot be cured. Accordingly, the provisions of the Order and Decision delegating authority to DES and rejecting the State Fire Marshal's proposed certificate conditions are final, and therefore cannot be challenged at this juncture.

A certificate of site and facility "when issued, shall be final and subject only to judicial review." *See* RSA 162-H:16, VI. Decisions made pursuant to RSA 162-H "are reviewable in accordance with RSA 541." RSA 162-H:11. RSA 541: 3 requires:

> Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

The above-referenced 30 day deadline is strictly observed. *See Route 12 Books & Video v. Town of Troy*, 149 N.H. 569 (2003) (regarding the strict application of statutory time requirements). Unlike the Public Utilities Commission, which has been granted express authority by the Legislature to alter and amend its orders at any time, *see,* RSA 365:28[1], the SEC only has authority to reconsider its final decisions within the time frames specified in RSA 541; it cannot reconsider final decisions made more than two years after the rehearing/reconsideration deadline passed. *Id.*; *see American Trucking Assocs. v. Frisco Transportation Co.*, 538 U.S. 133 (1958) (finding that notwithstanding authority to make ministerial changes to an administrative decision, federal administrative agency may not use

[1] RSA 365:28, concerning only the Public Utilities Commission, provides that "[a]t any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it."

"power to correct inadvertent ministerial errors . . . as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies").

III. GROTON WIND MADE NO MATERIAL MISREPRESENTATION TO THE SUBCOMMITTEE.

The underlying premise for many of the State Fire Marshal issues raised by Counsel for the Public and Mr. Rampino is patently false -- Groton Wind did not make a material misrepresentation of fact at the adjudicative hearings in this docket. Mr. Cherian's testimony on March 22, 2011 that the Fire Marshal intended to "impose the intent of the codes, not the actual specifications" was based upon information provided to him by Karl Delooff, Iberdrola Renewables' Director of Environment, Health and Safety – Engineering and Construction. *See Affidavit Edward Cherian* and *Affidavit of Karl Delooff*, submitted herewith.

As Mr. Delooff's Affidavit indicates, he had several conversations regarding fire suppression and NFPA standards with Investigator Anstey of the State Fire Marshal's Office during 2010 and 2011. *Affidavit of Karl Delooff*, ¶¶ 2-4, 6. Investigator Anstey stated to Mr. Delooff in the fall of 2010 that he (Investigator Anstey) wanted to meet the "intent of standards for fire suppression even if technical compliance cannot be achieved at the time." *Id.* at ¶ 9. As of the spring of 2011, Mr. Delooff was not aware of any fire suppression technology that was integrated into the nacelle and internal computer controls by the turbine manufacturer. *Id.* Investigator Anstey failed to respond to follow-up telephone calls from Mr. Delooff and regarding an invitation inspect a nacelle on the ground. *Id.* at ¶ 7. In his testimony to the Subcommittee in March, 2011, Mr. Cherian relied on information provided by Mr. Delooff regarding Mr.

Delooff's communications with Investigator Anstey. *Affidavit of Edward Cherian*, ¶ 3-4.

In view of the foregoing, Mr. Cherian made no material misrepresentation or untrue statement to the Subcommittee, and therefore no ground for certificate suspension exists under RSA 162-H: 12, II or any other provision of law.

IV. CLAIMS REGARDING THE STATE FIRE MARSHAL'S AUTHORITY IN THIS CASE ARE INCORRECT AS A MATTER OF FACT AND LAW.

Counsel for the Public and Mr. Rampino misapprehend the State Fire Marshal's authority to regulate the Groton Wind Project and his ability to reopen and relitigate issues already decided by the Committee.

A. The State Fire Marshal Does Not Have Authority Over The Groton Wind Project And Cannot Compel The Installation of Automatic Fire Suppression Or Sprinkler System.

The State Fire Marshall does not have authority to enforce the state fire code in Groton unless so requested by the Town. RSA 155-A:7, I states as follows:

> The local enforcement agency appointed pursuant to RSA 674:51 or RSA 47:22 shall have the authority to enforce the provisions of the state building code and **the local fire chief shall have the authority to enforce the provisions of the state fire code**, provided that **where there is no local enforcement agency or contract with a qualified third party** pursuant to RSA 155-A:2, VI, **the state fire marshal** or the state fire marshal's designee **may enforce the provisions of the state building code and the state fire code,** subject to the review provisions in RSA 155-A:10, **upon written request of the municipality.**

When read in its entirety, the foregoing statute makes clear that the local fire chief has the authority to enforce the state fire code and the State Fire Marshal has authority to enforce the state building code in a municipality that has no local enforcement agency or contract with a qualified third party only **"upon the written request of the**

municipality." RSA 155-A:7, I. Because the Town of Groton has a fire chief, the authority to enforce the state fire code rests with the Groton fire chief. And, although Groton has no local building code enforcement agency, it has not made a written request to the State Fire Marshal seeking state building code enforcement[2]. In fact, it is the Groton Select Board's "understanding that the Town Fire Chief enforces the building and fire code." *See* Groton Wind's Opening Brief, Attachment A. The Groton Fire Chief has exercised his authority by visiting the O&M building several times during construction, touring the building in March, 2013, and issuing a letter indicating that he found the building to be "very acceptable". *See* Groton Wind's Opening Brief, Attachment B.

In view of the foregoing, the State Fire Marshal lacks authority to enforce the state fire or building code with respect to the Groton Wind project. This position is further supported by RSA 155-A:2, IX which states that nothing in that chapter "shall be construed to permit or encourage the state to initiate or assume an independent role in the administration and enforcement of the state building code for a building or structure that is not owned by the state unless otherwise authorized by law."

Because it lacks fire and building code enforcement authority in this case, the State Fire Marshal's Office cannot compel Groton Wind to install a fire suppression system. Although Counsel for the Public cites RSA 153:5 for the proposition that the Fire Marshal may require installation of automatic fire suppression or sprinkler systems, the statute does not support the asserted proposition. A careful reading of that statute reveals that only one subsection mentions fire suppression or sprinkler systems. RSA 153:5, III states "[t]he state fire code and associated rules shall not require automatic fire

[2] Groton Select Board Member Miles Sinclair represented to the undersigned counsel in a phone conversation on December 31, 2013 that the Town of Groton Select Board had not made a written request of the State Fire Marshal for code enforcement.

suppression or sprinkler systems in detached one, or 2-family dwelling units in a structure used only for residential purposes." The statute certainly does not provide authority for the position that the State Fire Marshal can compel Groton Wind to install an automatic fire suppression system.[3]

B. The Subcommittee Was Not Required to Adopt the State Fire Marshal's Recommendations and Its Decision is Final and Unappealable.

As explained above, the State Fire Marshal does not have independent authority to require Groton Wind to install an automatic fire suppression system. Furthermore, the Subcommittee had ample opportunity to consider these issues prior to granting the Certificate and cannot now reopen this docket to relitigate long-settled issues.

Groton Wind submitted comprehensive project plans to the SEC on March 26, 2010 as part of its application for a Certificate of Site and Facility pursuant to RSA 162-H. As required by RSA 162-H:6-a, I, the SEC's attorney sent a letter on April 5, 2010 to several state department heads, including Department of Safety Commissioner John J. Barthelmes, informing them that if they did not have a copy of the Groton Wind application, they were to contact Attorney Iacopino immediately. Thus, all agencies within the Department of Safety (including the State Fire Marshal's Office) were served with written notice of the Groton Wind application and were given an opportunity to participate in the SEC process. However, the State Fire Marshal's Office did not actively

[3] Assuming, *arguendo,* that the State Fire Marshal has the authority to enforce the state fire code, such authority must be exercised by giving consideration to the written recommendations of the local fire chief, *see* RSA 153:8-a, II and must be coordinated with local fire department officials. RSA 153:4-a, II. The Groton Fire Chief has not indicated that a monitored fire suppression system in each wind turbine tower is necessary. Moreover, the Decision notes that "monitored fire suppression systems, although available, are not standard in the industry, provide little protection and increase the risks to employees associated with accidental discharges of the suppression system." Decision at 74. In view of the foregoing, the Subcommittee correctly decided not to adopt the State Fire Marshal's request to impose a Certificate condition requiring the installation of a fire suppression system.

participate in the SEC process. Instead, the Fire Marshal filed a letter late in the adjudicative phase of the proceedings, requesting that the SEC include several conditions in Groton Wind's certificate should one be issued. *See Letter from J. William Degnan, Director/State Fire Marshal to Jane Murray* (Oct. 17, 2010).

Contrary to Mr. Rampino's arguments at page 14 of his Memorandum, the Subcommittee was not required to accept the Fire Marshal's recommendations for Certificate conditions, and its failure to adopt the requested conditions does not constitute grounds for revocation or suspension of the Certificate. The Subcommittee gave "due consideration to the request of the Fire Marshal" but did not adopt the requested certificate conditions. Decision at 74. Rather, the Subcommittee conditioned Groton Wind's certificate upon the Applicant's compliance "with all applicable federal and state fire, safety, and building codes." *Id.*

RSA 162-H:16, I provides that the SEC cannot issue a certificate if any of the other state agencies "having jurisdiction...to regulate any aspect of the construction or operation of the proposed facility...*denies authorization for the proposed activity over which it has jurisdiction.* The denial of any such authorization shall be *based on the record* and explained in reasonable detail *by the denying agency*." (Emphasis added.) Mr. Rampino's position is not supported by the statute.

First, as explained above in Section IV. A., the State Fire Marshal does not have jurisdiction to enforce the state building and fire codes in connection with the Groton Wind Project, nor has the State Fire Marshal "denied authorization" in this case. Second, the State Fire Marshal failed to provide a full record of its concerns, and failed to explain its position in reasonable detail. Although the State Fire Marshal had the opportunity to

participate in the SEC process beyond its late-filed letter, it did not. *See* Decision at 74 (the Subcommittee determined that it had "not received any confirmation of a change in the Fire Marshal's position"). Furthermore, Mr. Rampino and the State Fire Marshal cannot now, years after the granting of a Certificate, challenge matters that the Subcommittee ruled upon in its Order and Certificate, or its Decision. *See Section* II, *supra*; RSA 541:3.

To the extent that the State Fire Marshal sought, as part of the SEC process, authority to "review all plans relative to the project and perform routine compliance inspections during construction and a final acceptance inspection," that request was denied in the Certificate. *Letter from J. William Degnan, Director/State Fire Marshal to Jane Murray* (Oct. 17, 2010); Decision at 74. The Subcommittee also denied the State Fire Marshal's request that monitored fire suppression systems be installed in each nacelle and generator housing. Decision at 74. Neither the State Fire Marshal nor Mr. Rampino moved for rehearing or reconsideration of the Subcommittee's Order or Decision within 30 days as required by RSA 541:3. New Hampshire law is clear and unequivocal on these issues; these claims are unquestionably time-barred. *See* Section II, *supra.*

C. Groton Wind Has Not Violated Applicable Codes.

Counsel for the Public's memorandum incorrectly states that the Decision "conditioned the Certificate upon compliance with the Fire and Building Codes." *Memorandum of Counsel for the Public* at 15. What the Subcommittee actually did was to direct Groton Wind to "comply with all *applicable* federal and state fire, safety, and building codes." Decision at 74. While Investigator Anstey's letters of August 12, 2013

and October 18, 2013 (to Attorney Iacopino) cite various provisions of the International Building Code and National Fire Prevention Act, neither letter explains whether those provisions are "applicable" to a wind farm. Nor do they allege specific facts on the part of Groton Wind that would constitute violations of the particular code provisions cited in the letters. This leaves Groton Wind with the untenable task of formulating Investigator Anstey's arguments for him and then responding to them - a situation that is totally at odds with Groton Wind's due process rights and with principles of fundamental fairness. Nevertheless, and without waiving its right to more specific and timely notice of the State Fire Marshal's factual and legal allegations, Groton Wind responded to the August 12th letter in its Opening Brief which, as noted above, is incorporated herein by reference.

D. The Law Does Not Require Groton Wind to Obtain Building or Fire Permits In Addition to Its Certificate of Site and Facility

Both Mr. Anstey and Mr. Rampino incorrectly assert that Groton Wind must obtain local building and fire permits. Investigator Anstey asserts that the state building code requires that certificates of occupancy be issued for the structures at the Groton Wind project and that such certificates have not been issued. *See* Correspondence from Investigator Anstey (Aug. 12, 2013). Also misapprehending the SEC process, Mr. Rampino asserts that Groton Wind is subject to the provisions of RSA 155-A:4, I which requires persons constructing "buildings and structures" to "obtain a permit." He also asserts that such building permit is issued "at the local level." *Memorandum in Support of Revocation or Suspension of Certificate* at 13. For the reasons discussed below, these arguments are invalid.

First, these arguments fail to recognize that there are no occupancy requirements for the Town of Groton, Opening Brief of Groton Wind, LLC, Attachment B. Even if

such permit requirements existed, the SEC's certificate of site and facility supersedes the enforcement of any such local requirements. *see Public Service Company of New Hampshire v. Town of Hampton,* 120 N.H. 68 (1980). that

Second, these arguments must fail as they ignore the language of RSA 155-A:2, III which states that the issuance of permits pursuant to the state building code is expressly reserved to local authorities "[t]o the extent that it does not conflict with any other provision of law." Because the building permit scheme under RSA 155-A conflicts with the provisions of RSA 162-H, the latter statute governs, as plainly indicated in RSA 155-A:2,III, and in accordance with the holding of *Public Service Company of New Hampshire v. Town of Hampton,* 120 N.H. 68 (1980). Although Mr. Rampino's memorandum at page 13 states that "[f]ire permits, governed by RSA 153, use the same approach" as building permitting, nothing in the statutes cited by Mr. Rampino supports the position that Groton Wind was required to obtain a "fire permit" before commencing construction of the Project.

Through the integrated permitting process governed by RSA 162-H, Groton Wind has obtained all of the approvals needed to construct the facilities comprising the Project. No additional building or fire permits are needed.

V. REVISED SITE PLANS

The Site Evaluation Committee Subcommittee ("Subcommittee")[4] lawfully delegated to the Department of Environmental Services ("DES") the authority to approve Groton Wind's revised site plans, and Groton Wind's actions in this matter were lawful and consistent with the terms of its Certificate. Groton Wind properly relied on DES's express "confirmation to proceed with the ***minor*** modifications" to the site plans.

[4] Under RSA 162-H:4, V, the Subcommittee's powers and duties are coextensive with the Committee's.

Electronic mail from Craig Rennie, NHDES Water Division, to Peter Walker (Dec. 5, 2011)(emphasis added).[5] In these circumstances, the SEC cannot penalize Groton Wind.

A. The SEC Properly Delegated Authority to DES to Approve Revised Site Plans

When read together, all of the documents comprising the Subcommittee's approval of Groton Wind's application for a Certificate of Site and Facility yield the inescapable conclusion that the Subcommittee provided the DES with authority to approve revisions to the site plans submitted with Groton Wind's application. More specifically:

> 1. The Subcommittee's May 6, 2011 Order and Certificate of Site and Facility included as part of the Order, the Subcommittee's Decision (May 6, 2011) "and any conditions contained therein." Order (May 6, 2011) at 2.
>
> 2. The Decision "incorporated into the Certificate" the Wetlands Permit and Alteration of Terrain ("AoT") Permit issued by DES. Decision Granting Certificate of Site and Facility With Conditions ("Decision") (May 6, 2011) at 19, 20.
>
> 3. "Project Specific Conditions" listed in both the Wetlands and AoT Permits include the requirement that DES review and approve any revisions or changes in the Project's site plans. (Wetlands Permit Project Specific Condition #2; AoT Permit Project Specific Conditions #4 and #1).
>
> 4. The Subcommittee's Decision expressly delegated "authority to approve amendments to the Alteration of Terrain Permit to the New Hampshire Department of Environmental Services, Water Division" Decision at 20 and "delegate[d] its authority to approve amendments to the Wetlands Permit." Decision at 19. Similarly, the Subcommittee's Order granted DES "the authority to approve modifications or amendments to [its] permits and certificates." Order at 3.
>
> 5. The Subcommittee also expressly delegated to DES 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." Decision at 61.

[5] This electronic mail message was submitted as Attachment 2 to Groton Wind's Motion to Amend Certificate.

These elements, taken together, clearly demonstrate the Subcommittee's intent[6] to delegate its modification authority to DES. The Parties do not have the ability to now, more than two years after the Decision and the Order and Certificate were issued, to contest the express terms enunciated above. *See* Section II, *supra.* Any argument regarding the Subcommittee's delegation authority, or any other aspect of its Decision and Order and Certificate should have been raised in accordance with RSA 541:3. *See* Section II, *supra.* Nonetheless, the Subcommittee was authorized to make the above-described delegations to DES. Pursuant to RSA 162-H: 4, III,

> [t]he committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to such state agency or official represented on the committee as it deems appropriate, but, subject to RSA 162-H:10, it may not delegate authority to hold hearings, issue certificates, determine the terms and conditions of a certificate, or enforce a certificate.

First, the Subcommittee acted within its authority under RSA 162-H:4, III because DES was represented on the Subcommittee, and the delegation to DES did not include holding hearings, issuing the certificate, determining the terms or conditions of the certificate, or enforcing the certificate. Contrary to claims of Public Counsel and Mr. Rampino, the Subcommittee did not delegate authority to DES to determine certificate conditions. The Certificate conditions were determined by the Subcommittee and DES implemented them but did not modify them.

Second, the Subcommittee is expressly authorized by RSA 162-H:16, VI to include in the Certificate "such reasonable terms and conditions as the committee deems

[6] Section II. D. of Mr. Rampino's Memorandum asserts that transcripts of the Subcommittee's deliberations support a finding that the Subcommittee did not delegate authority to DES to relocate the O&M building. These arguments must fail because they ignore that the Subcommittee's orders, not its deliberations, are controlling. *See, e.g.,* RSA 363:17-b ("transcript or minutes of oral deliberations shall not constitute a final order.")

necessary and may provide for such reasonable monitoring procedures as may be necessary." The DES Permit conditions (which were incorporated into the Certificate and are therefore Certificate conditions) authorizing DES to review and approve site plan changes are reasonable, as are the provisions of the Decision and Order delegating to DES the authority to monitor the Project and approve amendments to its permits. It is entirely reasonable for subject matter experts such as DES to review and approve site plan modifications necessitated by field conditions. In fact, the SEC has recognized that unanticipated post-adjudicatory/construction-phase field circumstances may be appropriately addressed by "a designated state agency or official if provided for in the Certificate." Application of AES Londonderry, L.L.C., SEC Docket No. 98-02, Order (April 4, 2001) at 2.

Lastly, the Subcommittee, as an administrative agency, has the implied or incidental power reasonably necessary to carry out the authority expressly granted to it. *Appeal of JAMAR,* 145 N.H. 152, 155 (2000) citing 2 AM. JUR. 2d *Administrative Law* §62, at 83-84 (1994). The legislature, in granting express authority to administrative agencies, "cannot anticipate all of the problems incidental to the carrying out of administrative duties." *Id.* The Subcommittee is an adjudicative body that cannot reasonably be expected to review and approve every site plan change necessitated by field conditions arising during the post-hearing construction phase of a certificated project. It therefore has the implied authority to "deputize" DES to review and approve modifications to site plans that were originally approved by DES and the Subcommittee when field conditions so warrant.

B. DES and Groton Wind Complied With the Clear Terms of the Certificate; Therefore, The SEC Cannot Revoke or Suspend The Certificate Or Otherwise Penalize Groton Wind.

Groton Wind and DES acted consistently with the Subcommittee's clear and unequivocal statements that DES was the proper agency having authority to modify the Project's site plans. Groton Wind acted in accordance with the Subcommittee's Order and Decision, and submitted revised Project plans to DES for approval. It did not engage in "trickery" or "silence" as Mr. Rampino alleges. Rampino Memorandum at 4.[7] In fact, quite the opposite occurred – Groton Wind worked with the State to assure compliance with the Certificate. Now, having done so, having received approvals and relied upon them in good faith, it would be a plain violation of Groton Wind's constitutional due process rights for the State to reverse course in any manner.

Groton Wind provided the relevant plans to DES and sought advice regarding the proposed changes. DES reviewed and found the revisions to be "minor" and indicated that "[t]he attached amended permits shall serve as confirmation to *proceed with the minor modifications as depicted on the revised plans*." Electronic mail from Craig Rennie, NHDES Water Division, to Peter Walker (Dec. 5, 2011) (emphasis added). DES issued amended approvals for the Project's Wetlands and Alteration of Terrain Permits as authorized by the Decision (at 19) and Order (at 3). *Wetlands Bureau Permit Amendment* (Dec. 5, 2011).

[7] Neither the Order nor the Decision stated that modifications or amendment to the DES permit conditions were subject to additional review or approval by the Subcommittee or the full SEC. Had the Subcommittee intended to reserve to itself the authority to review and approve changes to the site plans that were referenced in the DES permits, the Subcommittee certainly knew how to say so. In fact, for other matters, the Order specifically directed the Applicant to inform the Subcommittee, *e.g.*, to file the final interconnection agreement [*see* Order at 3]; immediately report new information or evidence of an historic site or other archaeological resources [*see* Order at 4]; and file the acoustics engineer's report within 30 days; [*see* Order at 5]). The Order provides no similar directive for site plan revisions.

In obtaining review and approval of its revised site plans (which DES deemed "minor modifications"), Groton Wind followed the process established by the Subcommittee in its decisions. Groton Wind relied upon the confirmation from DES to proceed with its "minor" modifications as depicted on the revised plans, and invested substantial resources in constructing the Project according to the approved site plans. The SEC cannot now alter the terms of its Certificate and Decision and articulate a new *post hoc* process for site plan revision approval without violating the provisions of the New Hampshire Constitution, Part I, Article 15 regarding due process of law (stating that no one "shall be . . . deprived of his property, immunities, or privileges . . . but by the law of the land.").[8] The Certificate and other decisions upon which Groton Wind relied and proceeded with facility construction are property interests within the meaning of the New Hampshire Constitution. *See, e.g., Town of Bethlehem v. Tucker,* 119 N.H. 927, 929 (1979) (revocation of a previously granted zoning ordinance is a deprivation of a constitutionally protected property interest which can only occur after the permittee has been granted due process of law). Altering those decisions or otherwise taking punitive action against Groton Wind for following them is impermissible. "At its most basic level, ...due process forbids the government from denying or thwarting the claims of [statutory] entitlement by a procedure that is fundamentally unfair." *Appeal of Eno*, 126 N.H. 650, 653 (1985).

The above-cited holding in *Eno* is instructive. In *Eno,* the plaintiff acted consistently with the Department of Employment Security's statements regarding steps she needed to take to establish her eligibility for unemployment compensation. *Eno,* 126

[8] The New Hampshire Supreme Court has determined that the protections under Part I, Article 15 are consistent with the Federal Constitution due process protections. *See, e.g., Riblet Tramway Co. v. Stickney*, 129 N.H. 140, 144 (1987).

N.H. at 655. She was then denied unemployment benefits "for failing to do more." *Id.* The New Hampshire Supreme Court found that "[t]his was fundamentally unfair and thus amounted to a denial of due process." *Id.* Similarly, in this case, Groton Wind followed the process articulated in the Certificate and was informed by DES that it could proceed with the "minor modifications as depicted on the revised plans by VHB dated October 28, 2011." *See* Electronic mail from Craig Rennie, NHDES Water Division, to Peter Walker (Dec. 5, 2011). Changing the site plan approval process at this late date would result in unfairness similar to that found by the Court to be impermissible in *Eno*. *Appeal of Eno*, 126 N.H. at 653; *see also Jones v. Bd. of Governors of Univ. of N.C.*, 704 F.2d 713, 717 (4th Cir. 1983) (noting procedural due process is denied when "assurances by governmental officers . . . have induced reasonable and detrimental reliance" if those assurances are "unfair and prejudicial") (citing *United States v. Caceres*, 440 U.S. 741, 752-53 & n. 15 (1979)). The SEC cannot now deprive Groton Wind of its constitutionally protected due process rights by taking steps to revoke or alter the Certificate, or otherwise penalize Groton Wind for complying with the terms of its Certificate as well as the confirmation provided by DES that Groton Wind could proceed with its minor site plan revisions.

C. Mr. Rampino's Local Zoning and Procedural Arguments Fail as a Matter of Law

Mr. Rampino's procedural and local zoning arguments must fail. First, Mr. Rampino alleges that Groton Wind does not have a certificate issued pursuant to RSA 162-H for the O&M building and therefore must comply with local zoning ordinances and obtain site plan approval. These arguments are without merit as they ignore that: Groton Wind does have a certificate that permits the construction of an O&M building;

the certificate allows DES to approve modifications to the site plan for that facility; and the state site evaluation process for energy facilities preempts local zoning and planning processes. *See Public Service Company of New Hampshire v. Town of Hampton,* 120 N.H. 68 (1980).

Second, Mr. Rampino argues that DES's approval of the modified site plans is void because DES did not hold a hearing regarding the proposed changes under RSA 162-H. This argument is without merit as it overlooks the fact that the Subcommittee held the public and adjudicative hearings required by RSA 162-H, and those hearings resulted in the Order and Decision conditions that directed DES to review and approve site plan revisions. No party challenged those conditions within the timeframe required by RSA 541:3 and DES acted in accordance with those conditions. No further hearings were necessary and DES's approval is not void. Further, the cases cited by Mr. Rampino in support of his argument do not apply here. The case of *Hussey v. Barrington*, 135 N.H. 227 (1992) deals with specific statutory notice provisions that apply to zoning boards of adjustment, and *Appeal of Union Tel. Co.,* 160 N.H. 309 (2010) deals with a telephone company's statutory notice and hearing rights when the Public Utilities Commission considers a competitor's petition for authority to operate the telephone company's franchise area. As neither of these situations is presented here, Mr. Rampino's notice and hearing arguments must fail.

Third, Mr. Rampino claims that DES did not follow it own statutory notice and hearing requirements for approval of the O&M building as a hazardous waste facility, and that Groton Wind, LLC did not obtain approval from the SEC for Gamesa Wind US to hold the hazardous waste permit. Rampino Memorandum (Dec. 4, 2013) at 10-11.

Neither of these claims has been noticed in this proceeding. Accordingly, any consideration of them at this juncture is improper. Moreover, consideration of these claims is beyond the scope of this proceeding. SEC Rule Site 202.09 ("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 facilities."); RSA 541-A:31 (requiring in notice "[a] reference to the particular sections of the statutes and rules involved and "a short and plain statement of the issues involved").

In addition, nothing in RSA 162-H provides the SEC with authorization to address alleged deficiencies in DES's processes for reviewing and approving hazardous waste permit applications that are filed outside of the SEC process. Accordingly, the SEC should not consider the arguments set forth in section II. G. of Mr. Rampino's Memorandum and may not grant his request for an order to remove all hazardous wastes O&M building or for revocation or suspension of DES's hazardous waste permit.

Respectfully submitted,

Groton Wind, LLC
By Its Attorneys

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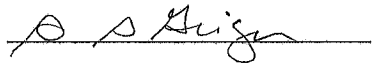
Dated: January 6, 2014

Certificate of Service

I hereby certify that, on this 6th day of January 2014, a copy of the foregoing Reply Brief was sent by electronic mail or U.S. mail, postage prepaid, to the persons named on the service list for this docket.



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Susan S. Geiger

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Docket No. 2010-01

RE: APPLICATION OF GROTON WIND, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
FOR A RENEWABLE ENERGY FACILITY IN GROTON, NH

AFFIDAVIT OF EDWARD CHERIAN

NOW COMES Edward Cherian, upon oath, being duly sworn, and states as follows:

1. I am employed by Iberdrola Renewables, and was the Project Manager of the Groton Wind Project.

2. On March 22, 2011, I testified before the New Hampshire Site Evaluation Committee in the above-captioned docket as follows: the Groton Wind Project had been "coordinating with the Fire Marshal's office, and they have indicated a clarifying letter may be forthcoming. Their intent was to impose the intent of the codes, not the actual specifications."

3. At the time I provided the foregoing testimony, I believed the statements to be true and accurate to the best of my knowledge and belief. The information upon which I relied in providing my testimony was provided to me by Karl Delooff, who is Iberdrola Renewables' Director of Environment, Health and Safety for Wind Construction.

4. Mr. Delooff's understanding of the State Fire Marshal's position at the time that I provided the foregoing testimony in this docket was to require that the Groton Project comply with the intent of the fire safety codes, not the specifications contained in

the codes. Mr. Delooff's understanding of the State Fire Marshal's position was based upon his conversations and meetings with Investigator Ronald Anstey of the State Fire Marshal's Office, as reflected in Mr. Deloof's affidavit submitted herewith.

5. In view of the foregoing, allegations that I made material misrepresentations of fact or untrue statements to the Committee are incorrect.

DATED this 30 day of December, 2013.

Edward Cherian

STATE OF New Hampshire

COUNTY OF Merrimack.

On this 30th day of December, 2013, the above-named Edward Cherian personally appeared before me and subscribed and swore to the foregoing.

Justice of the Peace

My Commission Expires:

STACIE E. ELLIOTT, Notary Public
My Commission Expires September 9, 2014

STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Docket No. 2010-01

RE: APPLICATION OF GROTON WIND, LLC
FOR A CERTIFICATE OF SITE AND FACILITY
FOR A RENEWABLE ENERGY FACILITY IN GROTON, NH

AFFIDAVIT OF KARL DELOOFF

NOW COMES Karl DeLooff, upon oath, being duly sworn, and states as follows:

1. I am employed by Iberdrola Renewables as the Director of Environment, Health and Safety – Engineering and Construction. In this capacity, I am responsible for overseeing the development of safety plans for Iberdrola's wind projects.

2. During the early development of Iberdrola's Groton Wind project in the latter part of 2010 and early 2011, I had several conversations with Investigator Ronald Anstey of the New Hampshire State Fire Marshal's Office regarding the issue of fire suppression inside of the wind turbines. Much of the discussion was focused on feasibility of fire suppression systems and worker safety. The main question we focused on was whether there is a feasible fire suppression technology for wind turbines.

3. The substance of the above-referenced conversations in part, included the following: Investigator Anstey indicated he was a proponent of a system produced and marketed by FireTrace. The system uses a compressed gas bottle and plastic tubing that would rupture when exposed to flame. The intent is that the gas would then escape the tubing and extinguish the fire. It was apparent that it could only work in the enclosed environment of the control cabinet – an area of very low fire risk due to both low

voltages and low current. The FireTrace system was not rated, even by FireTrace, to be able to extinguish a fire in the transformer room – an area where there is sufficient electrical energy, higher voltage and current, to start a fire. Neither would it be effective in or around the generator, inverters, braking system, gearbox, or hydraulic pump. My opinion, from a fire suppression perspective, is that the system is useless inside of a nacelle. The feasibility of the FireTrace system at that time was also questionable because it required monthly inspections – specifically weighing the cylinder. FireTrace added a pressure gauge, but this was not available at the initial stages of development of this system. The problem with monthly inspections is the monthly climb to inspect the pressurized gas cylinder. This is risk to our technicians from the obvious hazard of working at height, but also from an ergonomics perspective – they get worn out doing climbs. Therefore, the work in the turbines is designed to be as infrequent as possible to minimize the number of climbs up the turbine. Adding more climbs for inspecting a system of dubious utility is not consistent with Iberdrola's plan for worker safety. FireTrace is working on an experimental system, not yet proven, to transmit the gauge reading to the base section of the turbine, but the effectiveness of this experiment has not been demonstrated yet.

4. Another topic I discussed with Investigator Anstey in November of 2010 is the applicability of NFPA 850 to wind turbines. In discussing this matter, it was clear to me that Investigator Anstey and I did not share the same understanding of that standard. I discussed with Investigator Anstey the issue that NFPA 850 contains provisions that are not feasible or contemplated for enforcement in wind turbines. We spoke several times about the requirement for fire suppression contained in that regulation. Investigator

Anstey told me that when the regulations do not directly apply to a particular piece of equipment or application, the intent of the regulations should be met. The only requirement in the document was for a "Design Basis" document that would be discussed by stakeholders and the Authority Having Jurisdiction ("AHJ"). He stated that the AHJ has the ability to accept a performance standard rather than a strict compliance standard – especially when the technology or application are ahead of regulations.

5. Although Investigator Anstey indicated that he was the AHJ for Groton, we (i.e., myself and others at Iberdrola) understood that the Groton Fire Chief would be the AHJ. Iberdrola's experience in Lempster was that the local fire chief had jurisdiction, and we expected that Groton would follow the same track. Investigator Anstey attempted to lobby me to voluntarily put the project under his jurisdiction and indicated that there would be a benefit for both Iberdrola Renewables and the Office of the State Fire Marshal.

6. Other discussions between myself and Investigator Anstey regarding feasibility of fire suppression systems for wind turbines centered around the NFPA 850 mention of fine water mist. We both knew that would be infeasible inside of nacelles in New Hampshire, and spoke about the need for a 10,000 gallon tank on the top of nacelle. He indicated that he wanted some form of fire suppression and knew of the Bureau of Land Management's requirement for the proposed Iberdrola Renewables Project in California named Tule. I said that there was a vast difference between the dry tinder of southern California and the forest ridgeline in New Hampshire, and he disagreed. Investigator Anstey wanted to have the same requirement at Groton. I again said that we don't have these systems integrated, tested, or proven for use, yet. He was of the opinion

that if he forced the issue, the technology would then follow. He again pushed for the FireTrace system. Nothing came of these discussions due to Investigator Anstey failing to take or return my follow up phone calls after April of 2011 until 2013.

7. We made arrangements for Investigator Anstey Anstey to travel to Lempster to look at that wind energy facility and speak with Ryan Haley, Plant Manager of the Lempster wind facility. Investigator Anstey did visit the Lempster project in October, 2010. During that visit, he asked to inspect a nacelle, and was disappointed that we would not let him climb a turbine. I told him of our training and fit-to-climb requirements. I then made arrangements for him to inspect a nacelle on the ground at the Hardscrabble project in nearby New York in November 2010. He accepted and then failed to accept follow up phone calls and the appointment went unfulfilled. A few other e-mails were exchanged through April of 2011 and then no further communications were received from Investigator Anstey regarding the Groton Wind project until a meeting of stakeholders and interested parties was held on April 25, 2013 in Groton to discuss safety issues.

8. On November 4, 2010, I e-mailed Investigator Anstey to thank him for discussing Iberdrola's concerns, and stated, among other things the following: I requested that any letter he filed with the Site Evaluation Committee with recommendations for certificate conditions be specific to the Groton project, and that we work together over the intervening time, but as quickly as possible, to ensure compliance with the performance based standards. I stated that we share the common goal of preventing the loss of life, property, injuries, and fires from Iberdrola's operations, and that if we work together over the next few months we can agree on provisions to operate

safely and effectively in New Hampshire. I indicated that Iberdrola is fully supportive of meeting NFPA 1 and 101 for the operations and maintenance ("O&M") and other buildings on site, but that NFPA 850 covers additional areas and is relatively new from a design standard point of view within the wind turbine supply chain. I stated that NFPA 850 is behind the technology of fire prevention currently incorporated into the turbine design, that the prevention of fires has been the subject of turbine design for several turbine generations, and, as a result, fires have become rare in the later generations of turbines. I concluded the e-mail by requesting what else I could do or information I could provide, and indicated that I was sending the GL Certificate and standards so that Investigator Anstey could see the design criteria to which the turbines were built.

9. Investigator Anstey and I discussed several times in late 2010 and early 2011 that the current fire suppression technology does not protect the areas in the turbine that he identified as areas of concern. Since then, a technology has been introduced that may provide some protection, but has yet to be tested in the nacelle environment. He stated to me in October and November of 2010 that he wants to meet the intent of the standards even if technical compliance cannot be achieved at the time. As of April of 2011, I was not aware of any fire suppression technology that was integrated into the nacelle and SCADA (internal computer controls) by the turbine manufacturer. At the time of the discussions, and as of the present time, no other state had mandated fire suppression inside of nacelles.

10. I shared the foregoing information about my communications with Investigator Anstey with Edward Cherian before he testified at the Site Evaluation Committee adjudicative hearings on March 22, 2011.

DATED this 31 day of December, 2013.

Karl Delooff

STATE OF Michigan

COUNTY OF Ottawa

CONNI JO VOLLINK
Notary Public, State of Michigan
County of Ottawa
My Commission Expires Jan. 04, 2018
Acting in the County of Ottawa

On this 31 day of ~~December, 2013,~~ the above-named Karl Delooff personally appeared before me and subscribed and swore to the foregoing.

Notary Public

My Commission Expires:

Delooff Affidavit(final-kjd)-12_31_13