

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE
APPLICATION OF GROTON WIND, LLC
NO. 2010-01**

**REPLY MEMORANDUM OF MARK WATSON AND
THE INTERVENOR GROUP BUTTOLPH/LEWIS/SPRING**

Mark Watson and the intervenor group known as Buttolph/Lewis/Spring (collectively, the 'Intervenors'), respectfully offer this Reply Memorandum pursuant to the November 4, 2013 "Procedural Order and Notice of Possible Suspension of Certificate of Site and Facility" issued by the New Hampshire Site Evaluation Committee (Committee) in the above-captioned docket. The Order requested that the parties respond to the below two questions. This reply responds to Groton Wind's Brief specific to question 1.

- 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?
- 2.) Does the Office of the State Fire Marshal have the authority to regulate the project and does he have the authority to request suspension of the certificate in the manner contained in Inspector Anstey's letter dated August 12, 2013?

I. RESPONSE TO GROTON WIND, LLC

Groton Wind continues to insist that the Committee has the legal authority to delegate powers to the New Hampshire Department of Environmental Services (NHDES) which, by statute, reside solely with the Committee. A plain reading of RSA 162-H:4 III, makes clear that, the Committee "may not delegate authority to hold hearings, issue certificates, *determine the terms and conditions of a certificate*, or enforce a certificate." (*emphasis added*)

More than twenty conditions were included in the Committee's May 6, 2011 Order and Certificate of Site and Facility (Certificate) including the below condition pertaining to NHDES permits.

Further Ordered that all permits and/or certificates recommended by the New Hampshire Department of Environmental Services including the Wetlands Permit, the Site Specific Alteration of Terrain Permit, and the Section 401 Water Quality Certificate shall issue and this Certificate is conditioned upon compliance with all conditions of said permits and/or certificates which are appended hereto as Appendix I;

Condition #1 of the Wetlands permit and condition #4 of the AoT permit reference project site plans dated July 9, 2010. Any revisions to these plans would constitute a change to the terms and conditions of the Certificate and should have been brought to the attention of the Committee.

Groton Wind points to the "Project Specific Conditions" listed in the Wetlands and AoT permits which require that any plan revisions or amendments to construction details or sequences be submitted to NHDES for review and approval. (*Wetlands Permit Project Specific Condition #2 and AoT Permit Project Specific Condition #1*). These conditions are appropriate but, in no way negate the need to involve the Committee. Condition #6 of the AoT permit makes clear that an Applicant who is granted a permit is not relieved of its obligation to obtain other local, state or federal permits that may be required.

As has been cited by others in this proceeding, RSA 162-H:4 III and RSA 162-H:4 III-a strictly limit the ability of the Committee to delegate its powers. Under RSA 162-H:4 III-a, any delegation of powers by the Committee is constrained to activities that were approved by the Committee and/or authorized by the Certificate. (see bolded text below).

III-a. The committee may delegate to an agency or official represented on the committee the authority to specify the use of any technique, methodology, practice, or procedure **approved by the committee within a certificate issued under this chapter**, or the authority to specify minor changes in the 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.

There is no way in which Groton Wind's project revisions, which were made entirely outside the purview of the Committee, were not approved by the Committee and were not anticipated in the Certificate, can now be deemed in compliance with the law.

Groton Wind argues that, had the Committee intended to reserve its sole authority to review and approve changes to the site plans referenced in the NHDES permits, it should have stated such in the Certificate. In fact, the Committee did just that. In its Order granting Groton Wind a certificate, the Committee makes clear its action was pursuant to RSA 162-H: 4 (*See Order and Certificate at page 2*):

NOW THEREFORE, it is hereby ORDERED that the Application of Groton Wind, LLC, as amended, is approved subject to the conditions set forth herein and this Order shall be deemed to be a Certificate of Site and Facility pursuant to R.S.A. 162-H: 4

Since the law is unambiguous, it would be redundant for the Committee to restate its powers with each certificate granted. Upon our information and belief, this is the first time a project has challenged the powers of the Committee. Other project owners do not seem to share the same confusion that Groton Wind now suffers.

Groton Wind's characterization of the project's revisions as 'minor' and, thus, of insufficient import to trigger the Committee's review demonstrates a gross misuse of the technical terminology used by NHDES

when evaluating projects. Revisions to the project plans were deemed 'minor' by the NHDES Wetlands Bureau primarily because the changes met the measurable criteria as defined under NH Administrative Rule Env-Wt 303.03 for *Minor Projects* i.e. the changes resulted in less than 20,000 square feet of impact to jurisdictional wetlands. The statutes and administrative rules relied on by DES in making its findings do not impose the same statutory requirements as defined under RSA 162-H:16 IV. To argue now that NHDES has the power to approve project revisions on the order made in this docket and thereby relieve Groton Wind of having to meet the more comprehensive requirements under RSA 162-H makes no sense.

The Intervenors' concerns with the Wetlands permit extend to the AoT permit with one important exception. In reading the administrative rules governing AoT permits, it appears that Groton Wind was wrongly allowed to amend their AoT permit rather than obtaining an entirely new permit¹.

According to NH Administrative Rule Env-Wq 1503.22(a), if revisions to a permitted project exceed any of the criteria specified in Env-Wq 1503.21(d)(1)-(8), *and* exceed DES criteria cited under Env-Wq 1503.22(c), the permit holder *must* secure a new AoT permit.

The Groton Wind revisions, which involved moving the O&M building and associated parking at least 500-feet from where they were originally approved, required that Groton Wind file for a new AoT permit².

Pursuant to Env-Wq 1503.22(g), there is no apparent discretion granted NHDES to bend this rule.

¹ The Intervenors wrongly stated in their December 16, 2013 Objection (section II-A) that the project had met the criteria for an amended permit. We did not understand at the time of that filing that NHDES would take liberties with their rules to the extent that it did for Groton Wind.

² The Committee would need to determine if the relocated turbines also exceed the criteria cited Env-Wq 1503.22(a).

II. CONCLUSION

Groton Wind's arguments in no way persuade us that its actions were consistent with the Certificate or the laws governing the Committee. As long as our laws and rules matter, there is no explanation for Groton Wind's defense in this matter, other than a self-serving means of saving money at the expense of New Hampshire residents. Since the project's revisions were part of the project site, they should have been certificated by the Committee. The intervenors respectfully ask 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.

Dated this day of January 6, 2014

By:

/s/ Mark Watson

On behalf of the Intervenors: Buttolph/Lewis/Spring and Watson

cc: Parties to Docket 2010-01