

STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

Docket No. 2013-02

Re: Application of Atlantic Wind, LLC for a Certificate of Site and Facility for a Renewable Energy Facility Proposed to be Located in Danbury, Merrimack County and Alexandria, Grafton County, New Hampshire

January 13, 2014

**ORDER DETERMINING APPLICATION TO BE INCOMPLETE**

**I. Procedural Background**

On December 12, 2013, Atlantic Wind, LLC, a subsidiary of Iberdrola Renewables, LLC (Applicant) filed an application seeking a certificate of site and facility for the siting, construction, and operation of a 75.9 MW wind energy facility (Application) to be located in the towns of Alexandria (Grafton County) and Danbury (Merrimack County).

The facility as proposed (Facility) consists of 23 turbines with a nameplate capacity of 3.3 megawatts each. The Facility includes 13 turbines oriented generally in a southwest to northeast direction along Tinkham Hill and Braley Hill in Danbury. Two turbines would be located on the area known as the Pinnacle in Danbury. Eight turbines would be located on Forbes Mountain and Pine Hill in Alexandria. A connector road is proposed to be constructed between Tinkham Hill and Forbes Mountain. The Facility would also contain overhead collector lines and an operations and maintenance building in Danbury and a substation in Alexandria.

The proposed facility appears to be bounded by Washburn Road in Alexandria to the north, Carr Mill Road in Alexandria to the east, Ragged Mountain Highway in Alexandria and Danbury to the south and Wild Meadows Road in Danbury to the south and the west.

Upon receipt of the Application the Committee retained counsel. Counsel to the Committee provided notification of the filing to the relevant state agencies, municipalities and regional planning commissions and requested that each agency conduct a preliminary review as described in RSA 162-H: 6-a, I and RSA 162:7, IV. The agencies were asked to advise in writing whether the Application contained sufficient information for each agency to review and consider the issuance of permits, conditions or licenses under the jurisdiction of each agency. Between January 7 and 10, 2014, counsel to the Committee received substantive responses from six state agencies. Counsel's letters to state agencies and state agency responses are available to the public at the office of the Department of Environmental Services and on the Committee's website.<sup>1</sup>

**A. Department of Resources and Economic Development, Division of Forests and Lands**

The Department of Resources and Economic Development, Division of Forests and Lands, advised counsel by email, that the Application contains sufficient information for the Natural Heritage Bureau to conduct its data checks for the existence of rare and endangered species within the project area.

**B. Department of Transportation**

The Department of Transportation responded by email and by letter. The Department of Transportation noted that driveway permits for the Facility would not be required as the ingress and egress points appear to be located on town roads. Likewise, the Department of Transportation advised the Committee that the plans accompanying the Application suggest that the lay down yard and other construction areas will occur within the project boundaries and did

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<sup>1</sup> [www.nhsec.nh.gov](http://www.nhsec.nh.gov)

not require permission to use state lands. The Department of Transportation noted that once construction has begun the project will require more than 180 oversize/overweight deliveries, each of which will require a permit from the Department of Transportation. However, those permits are normally applied for by the shipping contractor once selected. The Department of Transportation also advised the Committee that if the Application were granted the Applicant would be required to cooperate with the District Maintenance Office to arrange for the removal of signage during transport of some of the turbine components. Finally, the Department of Transportation advised the Committee that if the Facility requires new transmission poles within the state's right-of-way the Applicant would be required to obtain a permit for upgraded transmission poles within said right-of-way.

**C. Department of Safety**

The Department of Safety responded to counsel's request on January 8, 2014. The Department of Safety clarified its regulatory authority regarding blasting activities, noting that the agency does not issue blasting permits but does regulate the sale, storage, handling, transportation, inspection, administration and use of explosives and certifies competency of those engaged in blasting activities. The Department of Safety did not find the need for clarification to be a basis to find the Application to be incomplete.

**D. Department of Cultural Resources, Division of Historical Resources**

The Department of Cultural Resources, Division of Historical Resources, responded to the notification. The Historical Resources Division advised the Committee that its authority stems from RSA 162-H, RSA 227-C: 9 and Section 106 of the National Historic Preservation Act. The Historical Resources Division advised the Committee that the Application does not

contain sufficient information for the division to consider a finding of the Facility's effect on historical resources under state or federal law. The division reports that the Application fails to contain the appropriate archaeological site inventory forms. In addition, the Historical Resources Division noted that the phase 1 archaeological survey contained within, appendix 37 of the Application contains sensitive information and failed to be prefaced with a required statement of confidentiality. The failure to maintain the confidentiality of the location of archaeological sites can result in vandalism and ransacking of sites.

**E. Department of Environmental Services, Water Division**

The Water Division of the Department of Environmental Services has jurisdiction to issue or deny three permits: an alteration of terrain permit, a wetlands permit and a 401 Water Quality Certification under Section 404 of the federal Clean Water Act. The Water Division has advised the Committee that the application contains sufficient information for the consideration of the alteration of terrain permit and to begin review of the request for a Section 401 Water Quality Certification. However, the Water Division advises the Committee that it has deemed the wetlands permit application to be incomplete. Specifically, the compensatory mitigation proposal contained within the wetlands permit application failed to identify a qualified easement holder for the proposed conservation easement on the 223 acre parcel known as the "Patten Brook parcel." The Application identifies the Department of Resources and Economic Development as the easement holder. However, the Department of Resources and Economic Development has declined the opportunity to hold the conservation easement. Therefore, the wetlands application is incomplete due to the failure to provide appropriate compensatory mitigation.

**F. Department of Safety, Office of the Fire Marshal**

The Department of Safety, Office of the Fire Marshal responded to counsel's letter on January 8, 2014. The Fire Marshal asserts that the Application is incomplete because Section D1 of the Application fails to identify the Fire Marshal as having authority to regulate any aspect of construction. The Fire Marshal points out that the Application also fails to identify the Fire Marshal as having authority to enforce the International Building Code 2009, NFPA 1 and NFPA 101 which are the minimum building, fire and life safety codes in the State of New Hampshire. The Fire Marshal asserts that neither Alexandria nor Danbury provides a code enforcement mechanism as referenced in RSA 674:51 and therefore notification must be provided to the Fire Marshal of the construction type prior to commencement of construction. In addition the Fire Marshal asserts that his office is responsible for enforcement of all laws relative to the protection of life and property from fire hazards and related matters. In this context he requests the Committee to adopt a series of building and fire safety conditions as part of any certificate of site and facility.

**II. Analysis and Consideration of State Agency Determinations that the Application is Incomplete**

**A. Division of Historical Resources**

The Division of Historical Resources has informed the Committee that the Application fails to provide sufficient information for the Division to consider the effect of the proposed project on historical resources under federal and state laws. The Application does not include archeological site inventory forms. In addition the Division of Historical Resources indicates that the Application as filed discloses sensitive archeological data that should remain confidential. As a result the Application reveals information to the public that could jeopardize the integrity of

potential archeological sites while failing to provide the Division with appropriate information to evaluate the relevant sites.

Review by the Division of Historical Resources is typically an iterative and consultative process. In prior cases this process has often extended beyond the granting of a certificate of site and facility. However, in those cases the ongoing consultation involved above-ground historical resources. Here, the Division of Historical Resources considers the Application to be incomplete because it fails to provide necessary data regarding archeological sites. While the effects of a new facility on above-ground historical resources may not be completely known until after construction is complete, the same cannot be said for archaeological resources. Archaeological resources are likely to be encountered early in the construction phase of the project. Therefore, the concerns expressed by the Division of Historical Resources are sound and do not contradict the position taken by the Division in previous cases. The Application is deemed incomplete for the reasons identified by the Division of Historical Resources.

#### **B. Water Division**

The Water Division of the Department of Environmental Services has informed the Committee that the wetlands permit application is incomplete because it fails to provide a complete compensatory mitigation program. The application proposes a conservation easement over a 223 acre parcel of land known as the “Patten Brook parcel.” The Application identifies the Department of Resources and Economic Development as the easement holder. However, the Water Division reports that the Department of Resources and Economic Development has since withdrawn its consent to hold the easement for the parcel and the wetlands permit application, therefore, is incomplete. The Applicant has filed a letter with the Committee explaining that, at

the time of the filing of the Application, the Department of Resources and Economic Development had, indeed, indicated its consent to hold the easement. The Applicant was advised of the withdrawal of that consent on or about December 31, 2013. The Applicant's letter highlights the conservation values of the parcel and suggests that a complete compensatory mitigation plan, including a substitute easement holder, can be achieved well in advance of May 14, 2014.

The timing of the withdrawal of consent by the Department of Resources and Economic Development may account for the misstatement regarding the easement holder. . Nevertheless, the result is that the wetlands permit application is presently incomplete. The Application is deemed incomplete for the reason identified by the Water Division.

**C. Fire Marshal**

The Fire Marshal's correspondence asserts that the Application is incomplete because it fails to identify the Fire Marshal as an agency with jurisdiction over the regulation of any aspect of the Facility. The Fire Marshal identifies the applicable minimum building, fire and life safety codes that would apply to the construction and operation of the Facility and reports that Fire Marshal notification of the type of construction is required. While the Application contains substantial information concerning the construction of the Facility, the Fire Marshal is correct that Section D-1 of the Application fails to identify the Fire Marshal and his authority to regulate the Facility. The Application is deemed incomplete for the reason identified by the Fire Marshal.

**D. Effect of a State Agency Determination of Incompleteness**

Pursuant to RSA 162-H:6-a, I and RSA 162-H: 7, IV state agencies with authority to issue permits, certificates and licenses are asked to conduct a preliminary review of the relevant

portions of the Application to determine if the Application contains sufficient information for the purposes of the state agency. If the Application does not contain sufficient information for review by any state agency the Applicant should be notified seasonably in writing of the deficiencies. RSA 162-H: 7, IV and the application deemed not to be “accepted.”

In this docket seasonable notice of the state agency determinations of incompleteness has been provided to the Applicant. The determinations made by the Water Division, the Division of Historical Resources and the Fire Marshal were provided via email to counsel for the Applicant on January 9, 2014 within two days of receipt by counsel.

The Application cannot be accepted due to the preliminary determinations made by the Division of Historic Resources, the Water Division and the Fire Marshal. The Application is deemed to be incomplete for failure to provide sufficient information to satisfy the application requirements of each state agency with jurisdiction.

### **III. Independent Preliminary Review by the Chair**

In addition to state agency preliminary review the Chair of the Committee or his designee must also review the Application to determine if it contains sufficient information to carry out the purposes of RSA 162-H. The review by the Chairman or his designee is independent of the preliminary review conducted by the state agencies. See, RSA 162-H: 6-a, II, and III; RSA 162-H: 7, II and III. By order dated December 17, 2013, Chairman Thomas Burack designated Vice-Chairman Amy Ignatius to serve as presiding officer in this proceeding and to conduct the preliminary review.

In this case the Application is currently incomplete because it fails to include information required by three state agencies. Additionally, after an independent preliminary review, the



Presiding Officer deems the Application to be incomplete because it does not contain sufficient information to carry out the purposes of RSA 162-H in an efficient manner.

**A. Independent Agreement with the Reasons Expressed by State Agencies**

In reviewing the Application to determine if it contains sufficient information to carry out the purposes of RSA 162-H, I deem the application to be incomplete for the reasons expressed in the correspondence from Department of Environmental Services, Water Division, the Department of Cultural Resources, Division of Historical Resources and the Fire Marshal. RSA 162-H: 6-a, VIII requires the consideration of an application for a certificate of site and facility to be commenced and concluded within 240 days of acceptance of an application. This is to assure that “undue delay in the construction of needed facilities be avoided” and that the Committee makes a “full and timely consideration of environmental consequences.” RSA 162-H: 1. In order for the compressed time frame to be effective it is necessary that the Committee be provided with complete information and have timely cooperation and input from state agencies. The effect of the project on wetlands, archeological sites and public safety are all concerns of this process. See RSA 162-H: 16. Therefore I independently find that the Application is incomplete due to the failure to provide necessary archeological data, the failure to submit a complete compensatory mitigation program as part of wetlands consideration and for failure to address the issues raised in the Fire Marshal’s correspondence.

In addition to the foregoing I independently find that the Application is incomplete for the following reasons.

## **B. Outstanding Raptor and Game Camera Surveys/Studies**

I have independently determined that the Application is incomplete because there are ongoing raptor studies and game camera studies which have not yet been reported and are not contained within the Application. A portion of the project area, Forbes Mountain, has not been surveyed and these ongoing surveys/studies are relevant to raptors and other wildlife within the previously un-surveyed area. See Testimony, Adam Gravel, p. 1-2. The prefiled testimony of Adam Gravel indicates that his testimony and the Bird and Bat Risk Assessment filed with the Application are based in substantial part on five field study reports that have also been submitted along with the Application (Fall 2009 Radar and Acoustic Surveys [Stantec 2011a], Spring 2010 Avian Bat Survey Report [Stantec 2011b], 2010 Spring and Fall Raptor Migration Surveys [Stantec 2011c], 2011 Mist Net Survey Report [Stantec 2012a], and 2011 Northern Long-eared Bat Habitat Assessment [Stantec 2012b]) and one literature review (Northern Long-eared Bat Habitat Requirements – Literature Review and Annotated Bibliography, Revised 2012 (Appendix 43)). The Bird and Bat Risk Assessment is based on a qualitative weight of the evidence methodology. See, Appendix 40, p. E.1, 2; Testimony, Adam Gravel, p. 10. Mr. Gravel asserts that the selected studies and the individual methodology used in each study was the result of a consultative effort with the New Hampshire Fish and Game Department and the United States Fish and Wildlife Service. As a result of those consultative efforts additional studies (presumably the 2013 Raptor Study and game camera study) continued into 2013 and appear to be ongoing. See Testimony, Adam Gravel, p. 6 (“Communication with the agencies regarding methodologies for additional wildlife surveys for the Project has continued into 2013.”) The weight of evidence approach used by Mr. Gravel in analyzing each study finds on-site surveys to

have the overall highest strength of association with the measurement endpoints concerning collision fatalities. See, App. 40, Table 3-2, 3-4, 3-6, 3-8. On-site studies play an important role underpinning the conclusions in the Bird and Bat Risk Assessment and in Mr. Gravel's opinions.

The results of the ongoing 2013 raptor and game camera studies would appear to be important and relevant to whether the Facility will have an unreasonable adverse effect on the natural environment. See RSA 162-H: 16, IV (c). This finding is a core finding that is required for the Committee to serve the purpose of its enabling statute – “to maintain a balance between the environment and the need for new energy facilities . . .” RSA 162-H: 1. Because the ongoing studies may impact the ultimate determination of the effect on the natural environment I find the Application to be incomplete.

In the past the Committee has accepted applications where studies have been ongoing. This has proved difficult, as the late filed reports cause delays in the adjudicatory process. See Application of Groton Wind, NHSEC 2010-01, Order on Pending Motions and Further Procedural Schedule Issued December 14, 2010 (late consideration of an alternative transmission route caused additional discovery and delay in proceedings). The statute requires strict time frames and deadlines. See, RSA 162-H: 6-a, and 7. Late filed reports and studies frustrate the discovery process, cause delays and undermine the orderly process of the proceeding and ultimately, the purpose of the statute. The Application is incomplete until the 2013 raptor study and the game camera study are included. Upon completion of the studies “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.” RSA 162-H: 7, VI.

### **C. Legal Relationship**

The Application fails to clearly describe the legal relationship between the Applicant and the site or facility. NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 301.03 (b)(6) requires an Application to include information about “[w]hether the applicant is the owner or lessee of the site or facility or has some legal or business relationship to it.” Section B.6 of the Application states that the Applicant will be the owner and operator of the Facility. That statement also asserts that the Applicant “has leases with the owners of the land where the project is proposed to be built.” However, a review of the entire Application, including the site plans filed with the Application, brings that statement into question. The Overview Plan Sheet Layout, Sheet C1.2 identifies an area within the “lease boundary line.” See General Notes, Legend, Site and Road Design Criteria, Sheet No. 1.3. A large portion of the overhead electric line proceeds outside the identified lease boundary area. The Application does not specify the legal relationship of the Applicant to that portion of the site and, if the plans are accurate, that portion would not appear to be leased by the Applicant. The Application is thus deemed incomplete for failure to clearly identify the legal relationship of the Applicant to the parcels implicated by the Facility. The Applicant shall identify the legal relationship of the Applicant and all parcels of land within the project site whether that relationship be as owner, lessee, or by way of easement or right of way. If a legal relationship is not established, the Applicant shall include in the Application a detailed description of the progress toward obtaining a legal relationship with the property and all alternatives to the configuration of the Facility as contained in the Application.

**D. Lack of Clarity regarding Location of Residences or other Structures**

Our administrative rules require certain specific information that we have deemed necessary to a complete application. See NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES Site 301.03. The rule requires an applicant to provide: “The location of residences, industrial buildings, and other structures and improvements within or adjacent to the site.” NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES, Site 301.03 (c) (3). Typically this portion of the application requirement is satisfied by providing a list of abutters identified either by street address or tax map. The Application, in Section C.3 provides some information in this regard but does so in a confusing manner. There is no identification of the location of residences or other structures, but instead a generalized “contextual” description of the structures in the overall area. Further, Section C3 references Figure 4. However, Figure 4 does not identify the location of residences or other structures as required by the rule. While the generalized contextual description of structures in the area is helpful, the Committee requires the identification and locations of all structures within and adjacent to the project area. This is necessary for the Committee to understand the effects of the project on the development of the region and the environmental, health and safety impacts of the project and adequately inform the public regarding the potential impact of the Facility. See RSA 162-H: 16. A list of abutters and a tax map from which the abutter’s locations can be determined is contained within the Application as an attachment to Appendix 1 as part of the Standard Dredge and Fill Permit Application (Wetlands Application). However, this list is not cross referenced from within the Application causing confusion. In the future, the abutter’s lists, tax maps and other relevant documents contained within the state agency applications or appendices to the applications shall be cross

referenced if they are relied upon to support a portion of an application. While I do not find this a basis to find the application incomplete, the Applicant shall supplement the Application within 10– days of receipt of this order or with any new filing.

#### **IV. Motions Filed During the Pendency of Completeness Review.**

During the pendency of completeness review the Committee has received a variety of correspondence and pleadings purporting to argue or litigate against the completeness of the Application or the process that the Committee should follow. The Committee received a letter dated January 6, 2014 from Lisa Linowes and April Frost Dugan asserting deficiencies in the application for a wetlands permit rendering the Application to be incomplete. On January 7, 2014, the Committee received a copy of a letter from the Wild Meadows Legal Fund (WMLF) to the water division of the Department of Environmental Services asserting deficiencies in the wetlands permit application. In addition WMLF has filed a motion urging the Committee to find the Application to be incomplete. The Applicant has objected to the motion. On January 10, 2014, NHWindWatch filed a motion to join in the motion filed by WMLF. On January 10, 2014, the Society for the Protection of New Hampshire Forests (SPNHF) filed a motion requesting that the Committee suspend all deliberation on the Application pending the adoption of administrative rules containing specific criteria for the siting of energy facilities.

It has not been the practice of the Committee to entertain litigation over its review of completeness of an application. The statute delegates completeness review solely to the Committee Chair, his designee, or the Committee depending on the type of facility. RSA 162-H: 6-a, II (renewable energy facility), RSA 162-H: 7, (energy facility). Nothing in RSA 162-H requires the Committee to entertain litigation over completeness. Neither the statute nor our

administrative rules contemplate or require litigation over the completeness determination. In fact all times frames pertaining to the issuance of a certificate of site and facility commence only upon the acceptance of an application as complete. See generally RSA 162-H: 6-a and 7. The time frames set forth in the statute render fair litigation over completeness to be impossible. The completeness review for a renewable energy facility must be completed within thirty days. See RSA 162-H 6-a. In this case the letter from Ms. Linowes and Ms. Frost Dugan and the motions from WMLF and NHWindWatch were filed with less than six days left in the period in which completeness must be reviewed by the Committee truncating the period of time for any effective response by the Applicant. The motions filed by WMLF and NHWindWatch pertaining to completeness review will be denied because they are out of order. They will be filed with other public comment in this docket.

SPNHF moves the Committee to suspend all consideration of the Application pending the adoption of administrative rules containing specific siting criteria. RSA 162-H:10, VII, requires the Committee to adopt administrative rules “pursuant to RSA 541-A, relative to criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV(b) and (c) have been met by the applicant for a certificate of site and facility.” The rules must be adopted no later than January 1, 2015. RSA 162-H: 10, VII. Prior to the adoption of such rules the Office of Energy and Planning (OEP) is required to conduct a public stakeholder process to develop recommended criteria. *Id.* This section of the statute is relatively new and was adopted in the 2013 legislative session where the amendment to the statute was referred to by its bill number as SB 99. SPNHF argues that the public interest requires suspension of deliberations until specific criteria are in place.

The SPNHF motion must be denied because there is no basis upon which I can find that the public interest is served by such a delay. At this point it is impossible to know the contents of the rules to be adopted or what the OEP stakeholder process may yield. There is no basis or data to support a finding that it is in the public interest to delay consideration of an application once it is determined to be complete. Moreover, one of the purposes of the statute is to avoid undue delay. See RSA 162-H: 1.

Notably absent from the amended statute is any requirement that the Committee refrain from considering applications filed before January 1, 2015. The legislative history of SB 99 reveals that amendments seeking to impose a moratorium on applications filed with the Committee pending the adoption of administrative rules were defeated both in committee and on the floor of the Senate. Therefore the motion of SPNHF seeking suspension of deliberations is denied.

All motions to intervene in this docket will be held in abeyance pending supplementation or re-filing of the Application and acceptance thereof.

## **V. Conclusion**

The Application is incomplete because it fails to provide sufficient information for the Water Division, the Division of Historical Resources and the Fire Marshal to satisfy the application requirements of each state agency, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility.

The Application is also incomplete because it does not include the ongoing 2013 raptor survey and game camera study which are necessary for a complete and timely review of the



Application within the time frames expressed in RSA162-H: 6-a and 7 or a clear identification of the legal relationship between the Applicant and the property proposed to comprise the Facility.

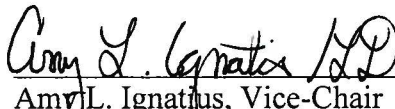
The Applicant may supplement the Application with the missing information within ten days of receipt of this order or may thereafter file a new application containing the missing information. If a new application is filed, it shall not be necessary for the applicant to undergo the expense and time to duplicate the materials previously submitted. Instead, clearly identified insertions supplementing or substituting for previously filed information shall be acceptable.

The motions filed by WMLF and NHWindWatch are out of order and therefore denied.

The motion of SPNHF is denied.

All motions to intervene in this docket shall be held in abeyance until such time as a complete Application has been accepted.

So ordered by the Site Evaluation Committee on this 13<sup>th</sup> day of January, 2014.

  
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Amy L. Ignatius, Vice-Chair  
Presiding Officer