Orr&Reno

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Re: Site Evaluation Committee Rules

Dear Attorney Wiesner,

These comments are submitted on behalf of EDP Renewables ("EDPR") on the annotated draft final proposed rules (8/27/15) of the New Hampshire Site Evaluation Committee ("Committee"). EDPR is the third largest wind energy developer, owner, and operator in the United States. It has 31 operating wind projects in the U.S. with a total installed capacity of approximately 4,000 megawatts in 11 states. EDPR is currently constructing three (3) projects and developing new projects around the country, including here in New Hampshire. EDPR was an active member of the stakeholder groups that worked on Senate Bill 245 (2014) which resulted in changes to RSA 162-H that prompted this rulemaking.

EDPR recognizes and appreciates the tremendous efforts of the Committee and its Staff in developing the proposed rules. However, EDPR respectfully submits that further revisions are necessary to address the issues discussed below.

At the outset, EDPR notes that there are three (3) wind energy facilities currently operating in New Hampshire under certificates of site and facility issued by the Committee. In adopting final rules that create more stringent application requirements, evaluation criteria and certificate conditions for wind facilities, or that otherwise depart from Committee precedent, EDPR respectfully urges the Committee to consider whether those changes are necessary or appropriate. One example is the Committee's proposed sound standards for wind facilities (Site 301.14(f)(2)) which are more restrictive than those imposed on the three wind facilities that are currently operating in New Hampshire.

EDPR also respectfully asks the Committee to avoid difficult or impractical standards, as they will either deter development of renewable and other energy facilities in New Hampshire or will result in numerous waiver requests that will add time and effort to an already labor-intensive and time-consuming process. An example is Site 301.08(a)(7) which would prohibit a wind facility's decommissioning funding plan from accounting for the anticipated salvage value of the project's components. This condition is financially burdensome and conflicts with industry practice and legislative intent[1].

Lastly, EDPR urges the Committee to avoid promulgating rules that would essentially result in moratoria on particular technologies or projects. The legislature has considered and rejected such moratoria[2], and the Committees rules must not create that result. In this regard, EDPR is concerned about Site 301.14(a)(6) which would require the Committee, in determining whether a proposed facility would have an unreasonable adverse effect on aesthetics, to consider whether the facility "would be a dominant feature of a landscape in which existing human development is not already a prominent feature as viewed from affected scenic resources." Because this condition would almost always apply to ridgeline wind facilities, application of this criterion could automatically lead to the denial of a certificate for terrestrial wind projects which, by necessity, must be located in highly visible locations (i.e. at high elevations where wind resources exist).

EDPR's specific concerns about particular proposed rules are set forth below and are presented according to the order in which the specific rules appear in the Annotated Draft Final Proposal dated 8/27/15. We have accepted the Committee's most recent revisions and made further revisions (which are noted in blacklined and bolded text), and have provided comments on each change.

PART Site 102 DEFINITIONS

~~Site 102.04 "Adjudicatory hearing" means "adjudicative proceeding" as defined in RSA 541-A:1, I, namely, "the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36."~~ **Comment: This term is not used in the rules and therefore may be deleted.**

Site 102.15 "Cumulative impacts" means the totality of effects resulting from the proposed facility, all existing energy facilities, **and** all energy facilities for which a certificate of site and facility has been granted.~~, and all proposed energy facilities for which an application has been accepted.~~

[1] *See* SB 281, as amended by the Senate (2014).
[2] The legislative history of SB 99 (2013) shows that the New Hampshire State Senate considered, but did not pass, a one year moratorium on electric energy generating facilities and electric transmission facilities. *Floor Amendment to SB 99*, #2013-1123s (March 26, 2013) (failing by a vote of 4 to 20), *see* http://www.gencourt.state.nh.us/legislation/amendments/2013-1123S.html (last visited March 17, 2015); *see also* HB 580 (2014).

Comment: This definition is impractical and onerous. The term is used in Site 301.03(h)(6) and 301.14(h). The definition and cited rules would require an applicant to provide information about its impacts along with those of another applicant whose project is yet to be approved (and may never be approved). Depending on when 2 applications are filed, an applicant may not know about or have access to information about another applicant such that a cumulative impacts analysis could even be performed at the time of application.

Site 102.20 "Historic sites" means "historic property," as defined in 36 C.F.R. §800.16(l)(1) and RSA 227-C:1, V. ~~I, and may include rural, designed, traditional and natural landscapes.~~

Comment: The phrase "and may include rural, designed, traditional and natural landscapes" should be deleted because it impermissibly broadens the cited legal definitions to include landscapes which, in and of themselves, may have no historical significance.

PART Site 201 PUBLIC INFORMATION SESSIONS AND HEARINGS

Site 201.01 Public Information Sessions Prior to Application.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held. This notice shall describe the nature and location of the proposed facility. The applicant shall mail a copy of this notice to the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places. ~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application.~~

Comment: This is an extremely broad requirement that may serve no useful purpose and would put added burden on an applicant. For example, a wind facility application might include studies referencing other wind projects in New Hampshire (e.g. Lempster and Groton) as well as those located in other states. As proposed, this rule would require an applicant to provide notice of the public information session to towns that could have no interest in or connection to the proposed facility. Moreover, newspaper publication should be legally sufficient to inform the general public as well as other communities besides the host and abutting communities given that for the past several years publication has been the *only* type of notice required for the SEC's public information hearings.

Site 201.02 Public Information Sessions After Application.

(b) The applicant shall publish a public notice not less than 14 days before each such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall mail a copy of this notice to the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places. ~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application.~~

Comment: See comment on Site 201.01(b), above.

Site 201.03 Public Hearings in Host Counties.

(d) The committee shall publish a public notice not less than 14 days before each such public hearing in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facility. The committee shall mail a copy of this notice to the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application.~~

Comment: See comment on Site 201.01(b), above.

Site 202.05 Participation of Committee and Agency Staff.

(a) The administrator and committee staff designated by the chairperson shall participate in adjudicative proceedings on an advisory basis.

Comment: The term "advisory basis" should be explained. If the administrator and staff are "advisors" to the SEC, will they be subject to ex parte rules such that they cannot communicate with parties and members of the public about a proceeding?

Site 301.03 Contents of Application.

(c) Each application shall contain the following information with respect to the site of the proposed energy facility and alternative locations the applicant considers **feasible** ~~available~~ for the proposed facility:

Comment: Although a site may be physically available to an applicant, the site may not be feasible for development of an energy facility. Therefore, an applicant should not be required to file the information below for all sites that it considers "available" but which are not feasible.

(1) The location and address of the site of the proposed facility;

(2) Site acreage, shown on an attached property map and located by scale on a U.S. Geological Survey or GIS map;

(3) The location, shown on a map, ~~of~~ **with** property lines~~,~~ **of** residences, industrial buildings, and other structures and improvements within the site, on abutting property with respect to the site, ~~or~~ **and** within 100 feet of the site;

Comment: The Committee's deliberations indicated that it wanted to include more properties. The conjunction "or" could be interpreted as providing a choice as to which buildings to include on the map; replacing "or" with "and" will ensure that more rather than less information is provided.

(4) Identification of wetlands and surface waters of the state within the site~~, on abutting property with respect to the site, or within 100 feet of the site~~;
Comment: An applicant may not have access to property owned by others and therefore would not be able to delineate wetlands on that property.

(5) Identification of natural, historic, cultural, and other resources at or within the site~~, on abutting property with respect to the site, or within 100 feet of the site~~;
Comment: An applicant may not have access to property owned by others and therefore would not be able to identify these resources.

(6) Evidence that the applicant has a current right, or an option or other legal right to acquire the right, to construct the facility on, over, or under the site, in the form of ownership, ground lease, easement, other contractual rights or interests, written license, or other permission from a federal, state, or local government agency, or through the simultaneous taking of other action that would provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing the facility thereon;

(7) Evidence that the applicant has a current or conditional right of access sufficient to accommodate a site visit by the committee and the performance of any required pre-construction monitoring or studies; and

(8) Identification of all participating landowners with respect to the proposed facility and a description of the affected properties owned by such participating landowners ~~and the scope of the waivers included in their participating landowner agreements, easements, or other contractual documents~~.
Comment: These agreements contain competitively sensitive commercial information that are typically subject to nondisclosure provisions. Requiring an applicant to provide this information would impair its ability to negotiate similar agreements with other landowners. Moreover, for various reasons, participating landowners may not want others to know the terms and conditions under which they have reached agreement with an applicant. If the Committee believes it needs this information, it should modify this rule to indicate that this information will be maintained confidential for use only by the Committee and will not be shared with any party to the proceeding.

(g) If the application is for an electric transmission line or an electric generating facility with an associated electric transmission **or distribution** line, the application shall include the following information:
Comment: Some electric generating facilities connect with the grid through distribution system lines. To avoid confusion, the Committee may wish to clarify that the information below must be provided for distribution lines associated with an electric generating facility.

(2) A map showing the entire electric **distribution or** transmission line project, including the height and location of each pole or tower, the distance between each pole or tower, and the location of each substation, switchyard, converter station, and other ancillary facilities associated with the project;
Comment: See comment above.

(h) Each application for a certificate for an energy facility shall include the following:

(2) Identification of the applicant's preferred choice and other alternatives it considers ~~available~~ **feasible** for the site and configuration of each major part of the proposed facility and the reasons for the preferred choice;
Comment: See comment on Site 301.03(c).

7) Information describing how the proposed facility will be consistent with the public interest, including the specific criteria set forth in Site 301.16~~(a)-(d)~~; and
Comment: See comment on Site 301.16.

Site 301.05 Effects on Aesthetics.

(b) The visual impact assessment shall contain the following components:

(7) Photosimulations from representative key observation points, **and** from other scenic resources for which the potential visual impacts are characterized as "high" pursuant to (6) above, ~~and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact,~~ to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility; photographs used in the simulation shall be taken at an equivalent focal length of 50 millimeters ~~and represent the equivalent of what would be taken with a 75 millimeter focal length lens~~ on a full-frame 35 millimeter camera and printed at 15.3 inches by10.2 inches, or 390 millimeters by 260 millimeters; at least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons;

Comments: 1) An applicant may not have access to private property for this purpose. In addition, "scenic resources" is defined as those to which the "public" has a right of access. Thus, requiring an applicant to do photosimulations from private property is inappropriate. 2) For the reasons outlined in Attorney Thomas B. Getz's letter dated September 10, 2015, this language should be deleted.

Site 301.08(a)(7) Effects on Public Health and Safety. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on public health and safety:

(a) For proposed wind energy systems:

(7) A decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in wind generation projects and cost estimates, which plan shall provide for removal of all structures and restoration of the facility site with a description of sufficient and secure funding to implement the plan, ~~which shall not account for the anticipated salvage value of facility components or materials,~~ including, **but not limited to,** the provision of financial assurances in the form of an ~~irrevocable standby letter of credit, performance bond, surety bond, or~~ unconditional payment guaranty executed by a parent company of the facility owner ~~maintaining at all times an investment grade credit rating~~;

Comment: 1) The legislature previously considered but rejected accounting for salvage value in a decommissioning funding plan. *See* SB 281, as amended by the Senate (2014). Including this provision is contrary to legislative intent and therefore is inappropriate. *See* RSA 541-A:13, IV (b) (JLCAR may object to a proposed rule if it is contrary to the legislature's intent). 2) The listed forms of financial assurances are financially onerous and are not required by statute. The suggested wording provides more flexibility regarding financial assurances for decommissioning.

Site 301.09 Effects on Orderly Development of Region. Each application shall include information regarding the effects of the proposed facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, ~~and master plans and zoning ordinances of the proposed facility host municipalities and unincorporated places, municipalities and unincorporated places abutting the host municipalities and unincorporated places, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application,~~ and the applicant's estimate of the effects of the construction and operation of the facility on:

Comment: The deleted language goes well beyond that contained in the applicable statute (RSA 162-H:16, IV(b)). The applicant should not be required to provide local master plans and zoning ordinances given that the SEC process preempts local zoning and planning processes. *See Town of Hampton,* 120 N.H. 68 (1980). Also, please see prior comments (e.g. on Site 201.01(b) regarding problems associated with providing information to or about "other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application."

(a) Land use in the region, including the following:

(1) A description of the prevailing land uses in the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application~~; and

Comment: See prior comments on this language, e.g. Site 201.01 (b).

(b) The economy of the region, including an assessment of:

(1) The economic effect of the facility on the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application~~;
Comment: See prior comments on this language, e.g. Site 201.01 (b).

(5) The effect of the proposed facility on tourism and recreation in the proposed facility host municipalities and unincorporated places, **and** municipalities and unincorporated places abutting the host municipalities and unincorporated places~~, and other municipalities and unincorporated places that are the subject of or covered by studies included with or referenced in the application~~;
Comment: See prior comments on this language, e.g. Site 201.01 (b).

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

(6) ~~Whether the proposed facility would be a dominant feature of a landscape in which existing human development is not already a prominent feature as viewed from affected scenic resources~~;
Comment: This situation almost always applies to a ridgeline wind energy facility. Consideration of this criterion could lead to an effective moratorium on wind projects. The legislative history of SB 99 (2013) shows that the New Hampshire State Senate considered, but did not pass, a one year moratorium on electric energy generating facilities and electric transmission facilities. *Floor Amendment to SB 99*, #2013-1123s (March 26, 2013) (failing by a vote of 4 to 20), *see* *http://www.gencourt.state.nh.us/legislation/amendments/2013-1123S.html* (last visited March 17, 2015); *see also* HB 580 (2014). It is therefore inappropriate to include this criterion.

(7) ~~Whether the visibility of the proposed facility would offend the sensibilities of a reasonable person during daytime or nighttime periods;~~
Comment: This criterion is extremely subjective. It is difficult to understand how an applicant could undertake to assess and demonstrate this criterion, much less how the Committee would do so.

(e) In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:

(4) The analyses and recommendations **if any** of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;
Comment: The qualifying language is necessary because, in the past, some of these agencies have not provided analyses and recommendations to an applicant or the Committee.

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of ~~45~~ **55** dBA or 5 dBA above background levels (measured at the L-90 sound level) ~~between the hours of 8:00 a.m. and 8:00 p.m. each~~ **during the** day, and the greater of ~~40~~ **45** dBA or 5 dBA above background levels (measured at the L-90 sound level) ~~at all other times during each day~~ **during the night**, as measured **at least 7.5 meters from the existing wall of any existing permanently occupied building on a non-participating landowner's property, or at the non-participating landowner's property line if it is less than 300 feet from an existing occupied building** ~~using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes~~;

Comment: The revisions above are consistent with conditions imposed by the NH SEC on other wind facilities in New Hampshire. It is unclear why the Committee is seeking to impose more restrictive standards on new facilities, especially when there has been no evidence to suggest that the existing standards have been ineffective in protecting the public. EDPR did not agree to the Committee's proposed standard (either during the SB 99 Stakeholder process or at any other time), and therefore disagrees that there was consensus on this standard. EDPR filed a similar comment on this proposed rule previously in this docket. In the alternative, EDPR suggests that given New Hampshire's success at siting wind energy facilities that are free of sound complaints, the Committee should consider simplifying the proposed rules and further suggests that the most restrictive sound limit (day or night) be no lower than 45 dBA

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider **the project's**

overall public benefits such as economic and environmental benefits to the State of New Hampshire and the New England Region. :

~~(a) Whether the environmental effects of the facility, considering both beneficial and adverse effects, serve the public interest;~~

~~(b) Whether the beneficial and adverse economic effects of the facility, including the costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies, serve the public interest;~~

~~(c) Whether construction and operation of the facility will be consistent with federal, regional, state, and local policies, including those specified in RSA 378:37 and RSA 362-F:1;~~

~~(d) Whether the facility as proposed is consistent with municipal master plans and land use regulations pertaining to (i) natural, scenic, historic, and cultural resources, and (ii) public health and safety, air quality, economic development, and energy resources; and~~

~~(e) Additional public interest criteria as are developed through the record in the proceeding.~~

Comment: 1) The suggested public interest standard is consistent with New Hampshire case law. *See, e.g., Appeal of Pinetree Power,* 152 N.H. 92, 96 (2005). 2) Subsection (c) is improper because the legislature repealed the requirement that the SEC find an application to be consistent with the state energy policy established in RSA 378:37. *See* N.H. Laws of 2009, Ch. 65:24, IX. (repealing RSA 162-H:16, IV (d)). The Committee may not circumvent the legislature's intent by including in its rules a requirement that the legislature has eliminated. 3) Subsection (d) is improper because local land use regulations and ordinances are preempted by RSA 162-H. *See Town of Hampton,* 120 N.H. 68 (1980). 4) Subsection (e) must be eliminated because it creates uncertainty and unfairness for an applicant and other parties to an SEC docket. The proposed rule would essentially permit the development of additional, unknown public interest criteria on an *ad hoc* basis in each proceeding. This result is impermissible as it would circumvent the rulemaking requirements of RSA 541-A.

Site 301.18 Sound Study Methology.

Comment: The need for such detailed, complicated and prescriptive rules is questionable. The enabling statute merely requires that the sound impact assessment be "prepared in accordance with professional standards by an expert in the field." RSA 162-H:10-a, II.(4). This flexibility will allow experts to incorporate new standards as they are developed. In other words, if new standards are developed after these rules are adopted, an applicant would not be held to the more recent standards. The text of the rule should be simplified and modified to reflect the wording of the above-referenced statute and to eliminate the very detailed technical provisions that are currently included. EDPR also urges the Committee to consider RENEW's comments on this issue.

Site 302.03 Revocation of Certificate.

(a) The committee shall have the authority to revoke a certificate according to this section.

(b) If the committee has suspended a certificate pursuant to Site 302.01 or Site 302.02 and the holder has failed to correct and mitigate the consequences of the violation or misrepresentation that was the basis for the suspension within the period of time specified in the suspension order, the committee shall initiate an adjudicative proceeding to revoke the suspended certificate.

(c) The committee shall provide 90 days prior written notice to the holder of the certificate that the committee intends to revoke the certificate and stating the reasons for the intended revocation**, and, except for emergencies, the committee shall conduct an adjudicative hearing prior to revocation of a certificate.**

Comment: Basic principles of fundamental fairness and due process of law require that before taking an action regarding a constitutionally protected property interest (such as a certificate of site and facility), the government must provide a certificate holder with notice and an opportunity to be heard.

Please contact me if there are any questions about this filing. Thank you for the opportunity to provide these comments.

Very truly yours,

S. S. Geiger

Susan S. Geiger

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