THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

In the matter of the Application for Certification Pursuant to RSA 162-H of Antrim Wind Energy, LLC	)	**Docket No. 2015-02**

MOTION OF COUNSEL FOR THE PUBLIC FOR REHEARING OR RECONSIDERATION

NOW COMES Counsel for the Public, pursuant to RSA 162-H:11, N.H. CODE OF ADMIN. RULES SITE 202.29 and RSA 541:3 and hereby moves, for rehearing or reconsideration of the March 17, 2017 Site Evaluation Committee Decision and Order Granting a Certificate of Site and Facility with Conditions ("Decision") on behalf of the Applicant Antrim Wind Energy, LLC ("AWE"). As grounds the following is set forth:

1. In its decision, the Site Evaluation Committee Subcommittee ("Subcommittee") made a number of rulings including: that proposed project would not have an unreasonable adverse impact on aesthetics;[1] and that the Decommissioning Plan submitted by AWE was acceptable.[2] The Subcommittee also waived the health and safety requirements in N.H. CODE OF ADMIN. RULES SITE 301.14 (f) as they affect the cooperating landowners.[3]

2. The Decision was unreasonable and unlawful because:

   a. The Subcommittee failed to follow its rules related to adverse effects concerning the impact of the project on aesthetics;

   b. The Subcommittee misapplied the doctrines of res judicata and collateral estoppel as applied to the issue of aesthetics;

[1] See, *Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, N.H. Site Eval. Comm., # 2015-02 ("Decision"); Order on Certificate of Site and Facility, 3/17/17, p. 121.
[2] *Id.* at p. 175-176.
[3] *Id.* at p. 168-169.

c. The Subcommittee failed to follow its rules related to the requirements for the decommissioning plan submitted by AWE;

d. The Subcommittee failed to follow its rules and improperly granted a waiver of health and safety regulations concerning sound, shadow flicker and setbacks for cooperating landowners; and

e. The Subcommittee failed to follow the statutory requirement of having a seven member panel including 2 public members to adjudicate this matter.

A. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES RELATED TO THE CRITERIA UNDER WHICH IT WAS REQUIRED TO CONSIDER THE PROJECT'S UNREASONABLE ADVERSE EFFECTS ON AESTHETICS[4]

3. The Subcommittee's ruling on aesthetics was unreasonable and unlawful because it failed to follow its rules establishing the criteria under which the Subcommittee was required to consider in making a determination as to whether the proposed project caused unreasonable adverse effects on the aesthetics of the region. N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(1) – (7), *eff.* 12/8/17. Under N.H. CODE OF ADMIN. RULES SITE 301.14(a) the Subcommittee was required to consider: 1) the existing character of the area of potential visual impact; 2) the significance of the affected scenic resource and their distance from the proposed facility; 3) the extent nature and duration of public uses of affected scenic resources; 4) the scope and scale of the change in the landscape visible from the affected resources; 5) the evaluation of overall daytime and nighttime visual impacts of the facility in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to N.H. CODE OF ADMIN. RULES SITE 202.24; 6) the extent to which the proposed facility would be a dominant and prominent

[4] Counsel for the Public joins in the arguments made in the Joint Motion for Rehearing of the Abutting Landowners Group, the Non-Abutting Landowners Group, the Levesque-Allen Group, The Stoddard Conservation Commission, and The Windaction Group, ("Intervenor Groups") filed on 4/14/17 with respect to the following issues: IV. Res Judicata, and V. Procedural Issues, a. The Subcommittee was not Lawfully Constituted; b. Waiver of Requirements; c. Procedural Fairness; VI. Substantive Issues, ii. The Subcommittee's finding that the Project will not have unreasonable adverse impacts on aesthetics is unlawful and unreasonable; and VI, iii, 4. Decommissioning. The instant Motion for Re-Hearing will contain additional arguments related to these issues raised by the afore-identified Intervenor groups.

feature within a natural or cultural landscape of high scenic quality or as viewed from a scenic resource of high value or sensitivity; and 7) the effectiveness of mitigation measures proposed by the applicant to avoid, minimize or mitigate unreasonable adverse effects on aesthetics and the extent to which such measures represent best practical measures. *Id.*

4. The record reflects that Subcommittee's analysis of that character of the region under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(1) consists of a cursory finding that the affected area was located in the Town of Antrim's rural conservation zone and contained a great deal of conservation land.[5] Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(2), the Subcommittee made no determination as to the significance of the affected scenic resources except to note that there was disagreement between the two experts on the subject.[6] However, the Subcommittee determined that two of the resources identified by Counsel for the Public's aesthetics expert as having unreasonable adverse impacts were private resources, and therefore should not have been considered. The two resources the Subcommittee addressed were Gregg Lake and Black Pond – both of which are public resources. So the Subcommittee's dismissal of the visual impact analysis for these two resources was error. Moreover, even if the photo-simulations from these resources were taken from a private property vantage point,[7] visual impact studies are also required by regulation to include visual simulations from a sample of private property observation points to illustrate the potential change in the landscape. N.H. CODE OF ADMIN. RULES SITE 301.05(b)(7). As such, the Subcommittee's outright dismissal of these resources from any kind of consideration was error.

5. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(3), the Subcommittee's

---

[5] Decision at p. 117.
[6] *Id.* at p. 118.
[7] Only one simulation - the photo-simulation taken for Black Pond – was taken from a private property vantage point.

discussion as to the extent, nature and duration of public uses of affected scenic resources noted that the resources were used for activities such as hiking, fishing and canoeing.[8] The Subcommittee described these as activities as limited in time or transient uses and therefore less likely to be impacted by the proposed project.[9] However, the Subcommittee's dismissal of so-called transient uses is unreasonable given that under Site 301.14, it is authorized to analyze only public resources[10] for aesthetic impact, and most public uses are likely to be transient. Further, the Subcommittee failed to consider evidence that visits by local users of these resources were far more frequent and regular and therefore far more likely to be impacted by the proposed project. The Subcommittee made no further findings regarding this criterion to support its finding that such uses would not result in an unreasonable adverse impact.

6. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(4), the Subcommittee did not directly address the scope and scale of the change in the landscape visible from the affected resources. However, under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(6) - the extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape, the Subcommittee looked at all of the visual simulations and stated whether it thought the impact was dominant, prominent and/or unreasonable.[11] These qualities address "scale" because "dominance" and "prominence" are terms of art used by aesthetics experts to indicate the "scale" of a project in relation to its surroundings.[12] Therefore, a finding that a project is dominant or prominent in a visual simulation equates to there being a scale issue. This criterion is significant because the primary finding of the SEC in Antrim I was that the project

---

[8] *Id.* at p. 118.
[9] *Id.*
[10] N.H. Code of Admin. Rules Site 102.45.
[11] *Id.*
[12] App. Ex. 33, Appendices 9a, p 24. Tr. Day 6 AM, 9/28/16, p. 21.

was out of scale with the regional resources.[13] The Subcommittee looked at visual simulations for nine scenic resources and found issues related to "dominance" and/or "prominence" with regard to five of the resources (Willard Pond, Franklin Pierce Lake (prominent), Gregg Lake (dominant and prominent), Meadow Marsh (dominant and prominent), Goodhue Hill (prominent and industrial but not dominant) and Bald Mountain (clustering).[14] [15] Even though the Subcommittee made findings that were nearly the same as the SEC in Antrim I as to the scale of the project, it found the effects on these resources were not unreasonable.[16] In this regard, neither the deliberations, nor the Decision contain any rationale as to why the Subcommittee found these scale issues reasonable in this docket.[17]

7. With regard to N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(6), the Subcommittee did not address nighttime visual impacts except to state that AWE was seeking FAA approval of radar activated lighting AWE's visual impact expert did not conduct any analysis of nighttime lighting except to indicate that is was seeking FAA approval of radar activated lightling.

8. Under N.H. CODE OF ADMIN. RULES SITE 301.14 (a)(7) the Subcommittee determined that the mitigation package offered by the applicant was sufficient to mitigate the adverse impacts of the project.[18] The mitigation proposed did not significantly differ from the mitigation project in Antrim I. The major items of difference are as follows: approximately 100 additional conservation acres added to a package that included 800+ acres of off-site

---

[13] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.
[14] Decision at pp. 118-120.
[15] The Subcommittee did not conduct a similar analysis of Black Pond because the point at which the simulation was taken was not a "public" resource.
[16] *Id.* at p. 21.
[17] *Id.*
[18] The Subcommittee actually took up mitigation before it had done any analysis as to whether there were any unreasonable adverse impacts on aesthetics. Typically this type of analysis is conducted after determinations are made as to adverse impacts.

conservation; a one-time donation from Antrim Wind to the New England Forestry Foundation of $100,000 for off-site conservation to be determined at a later date; a $40,000 payment to the Town of Antrim to offset the aesthetic impacts on Gregg Lake, and a $5000 scholarship to the Town of Antrim for some worthy students. The Subcommittee's acceptance of this mitigation package was unreasonable and unlawful because as indicated, *infra*., it was bound by the SEC's decision in Antrim I as to the use of off-site conservation land as mitigation for aesthetics.

9. In addition to failing to follow its rules under which the Subcommittee was to determine whether the project posed an unreasonable adverse impact on aesthetics, the Subcommittee also permitted AWE to submit a visual impact study that did not comport with its rules. N.H. CODE OF ADMIN. RULES SITE 301.05 (b)(8)e, 1 - 3 & (9). Further, the Subcommittee made inconsistent and arbitrary evidentiary rulings that prevented Counsel for the Public's aesthetic expert from rebutting AWE's expert's critique of her report.[19] Finally the Subcommittee erred in failing to consider the opinion of Counsel for the Public's other aesthetic expert, Jean Vissering who also determined that the changes made to current project did not sufficiently mitigate the unreasonable adverse impacts posed by the project to the surrounding region.

10. Dismissal of these two experts reports while permitting the Applicant's expert to submit a visual impact report that did not comply with the SEC rules was also unreasonable and unlawful.

B. THE SUBCOMMITTEE MISAPPLIED THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL AS APPLIED TO THE ISSUE OF AESTHETICS.

11. Counsel for the Public first raised the doctrines of *collateral estoppel* and *res*

[19] See Counsel for the Public's Motion to Reconsider Evidentiary Ruling and Request to Reopen the Record, 11/14/16, and hereby incorporated by reference within.

judicata during the jurisdictional phase of this application.[20] Even though the parties conducted discovery and their respective aesthetics experts submitted testimony relative to the issue of the materiality of the changes between proposed project in Antrim I and the current docket, the Site Evaluation Committee ("SEC") ultimately determined that the question of whether the differences between the were material enough to require a different result or even survive claims of issue preclusion or *res judicata* "cannot be determined on this record because [the Committee] does not have a complete application before [it]."[21]

12. In the current docket, Counsel for the Public again raised the issues of *res judicata* and/or issue preclusion with regard to the prior ruling of the SEC on aesthetics,[22] the identification of scenic resources being impacted by the proposed project and the ruling of the SEC concerning the value of off-site conservation land as appropriate mitigation for aesthetics.[23]

13. The Subcommittee's analysis of the applicability of *res judicata* in this docket is flawed for several reasons. First, the Subcommittee relied on the decisions of the New Hampshire Supreme Court in *Fisher v. Dover,* (holding that the Zoning Board of Adjustment ("ZBA") erred in granting an application for a second variance without considering whether the second application contained a material change of circumstances affecting the merits of the application, or the application is for a use that is materially different in nature and degree from its predecessor)[24] and *Morgenstern v Town of Rye*, (holding that the ZBA erred in refusing to consider a second application on the merits where the changes to the application no longer

---

[20] See, Counsel for the Public's Memorandum in Support of Objection to Petition for Jurisdiction, *Petition for Jurisdiction*, Dkt. #2014-05, pp. 15 – 19, July 7, 2015.
[21] *Id.*, 9/29/15 Jurisdictional Decision and Order, p. 38.
[22] Counsel for the Public raised claim preclusion with regard to the Subcommittee's determination on aesthetics because in Antrim I the SEC denied the certificate to AWE on the basis of its finding that the project posed an unreasonable adverse impact on the aesthetics of the regions. However, the doctrine of issue preclusion is also fully applicable to findings of the SEC on aesthetics issues as well. *Daigle v. City of Portsmouth*, 129 N.H. 561, 570 (1987).
[23] See, Post hearing Memorandum of Counsel for the Public, 11/21/16, pp. 3 – 13.
[24] *Fisher v. Dover*, 120 N.H. 187, 190 (1980).

required a retaining wall to protect the wetlands).[25]

14. The Subcommittee stated that a third case clarified the holding in *Fisher* and *Morgenstern* wherein the Court held that if the Board "invites submission of a subsequent modification to meet its concerns, it would find an application so modified to be materially different from its predecessor, thus satisfying *Fisher*." [26] *Hill-Grant Living Trust v. Kearsarge Lighting*, 159 N.H. 529 (2009). Based upon this legal framework, the Subcommittee identified certain differences between this docket and the project proposed in Antrim I, and noted that there had been changes to the controlling law and SEC rules.[27]

15. Regarding the changes to the project, the Subcommittee made no independent finding as to how the changes to the project related to the aesthetics impacts on the region. Further it is difficult to conclude that the changes were actually responsive to the SEC's concerns in Antrim I because, for example, the SEC ruled in Antrim I that off-site conservation land was not suitable mitigation for aesthetics impacts and a significant part of the changes in the current docket included off-site conservation land.

16. Further, the Subcommittee relied on the finding of the SEC in Antrim I that the changes proposed by AWE (after a decision had issued) "were material differences such that they could not be considered under the auspices of that Application." [28] Based upon this statement by the SEC in Antrim I, the Subcommittee concluded that this statement was akin to an invitation for submission of a new application.[29]

17. The Subcommittee's determination that this finding by the SEC in Antrim I was an invitation to file a new application is flawed for several reasons. The deliberations in Antrim

---

[25] *Morgenstern v. Town of Rye*, 147 N.H. 558, 565 (2002).
[26] *Id.* at 41- 42, 49.
[27] *Id.* at 49.
[28] *Id.*
[29] *Id.*

I reflect that SEC members expressed concern that re-opening the record at that late stage may set a precedent for applicants to try a case under one set of facts and substitute facts after they didn't prevail.[30] There was also concern expressed that about how the changes would impact the financial capability of the AWE.[31] Further, the SEC did not find that the changes proposed amounted to material changes that would impact aesthetics, but rather the entire application.[32]

18. Moreover, the SEC addressed the issue of whether or not its prior ruling in Antrim I constituted an invitation to file a subsequent application in the jurisdictional phase of this proceeding and it concluded that the SEC in Antrim I did not invite the second application.[33]

19. The Subcommittee has identified no evidence in the record or any other rationale for making a finding contrary to the SEC's finding in its Jurisdictional Decision and Order. The rationale discussed by the SEC in its deliberations in Antrim I, as well as the late stage at which the changes were proposed provided sufficient grounds for the SEC to deny AWE's Motion for Re-hearing and to Re-open the Record, and they provide no basis to conclude that the SEC was "inviting" AWE to re-file it application.

20. Because the Subcommittee relied upon this finding to support its finding that the changes between the projects were material and responsive to the comments by the SEC in Antrim I, the Subcommittee's finding that *res judicata* does not apply to these proceedings is unreasonable and unlawful.

21. Similarly the Subcommittee made no finding as to how the changes in the law or rules affected the outcome such that they would be an intervening force negating the doctrine of

---

[30] *Id.* See, Counsel for the Public's Memorandum in Support of Objection to Petition for Jurisdiction, *Petition for Jurisdiction*, Dkt. #2014-05, p. 10.
[31] *Id.*
[32] *Id.*
[33] *Jurisdictional Decision and Order*, Docket 2014-05, 9/29/15, p. 34

res judicata or *collateral estoppel*.[34] To the contrary, the new rules appear consistent with the rulings of the SEC in Antrim I. For example, in Antrim I, the SEC disagreed with AWE's aesthetics expert as to his identification of important scenic resources because AWE's expert had an overly restrictive definition of scenic resources that demonstrated a bias to federal and State resources; whereas the SEC identified a number or local and regional resources as important scenic resources and also found that were unreasonably adversely impacted by the project.[35] In furtherance of the SEC finding in that regard is a rule defining "scenic resources" that include a variety of federal, State and municipal resources. N.H. CODE OF ADMIN. RULES SITE 102.45.

22. The Subcommittee's ruling that the doctrine that *collateral estoppel* did not apply to the SEC's ruling in Antrim I regarding the identification of sensitive sites and the value of off-site conservation land in mitigation of aesthetic impacts, is unreasonable and unlawful because the matter was fully and fairly litigated in Antrim I, and there is insufficient basis to conclude that was a case-specific holding.

23. In this regard, as noted in paragraph 20, both parties submitted visual impact assessments that included a determination of sensitive sites and the impact of the project on those sites. AWE submitted a mitigation package for aesthetics in Antrim I that included over 800 acres of conservation land. The record contains nothing indicating that AWE was prevented from submitting evidence in support of its proposition that its proposal was suitable to mitigate aesthetic impacts. After the Decision and Order issued, again, AWE was afforded the opportunity to address the suitably of this proposed mitigation for aesthetics and it did not do that. Instead, AWE offered an additional 100 acres of conservation land. Finally, the record reflects that AWE was aware of its right to appeal the decision of the SEC the New Hampshire

[34] See, Post hearing Memorandum of Counsel for the Public, 11/21/16, pp. 14

[35] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.

Supreme Court and it did not file an appeal. Thus, it is unreasonable to conclude that the matter was not fully litigated.

24. Regarding the Subcommittee's finding that this ruling by the SEC in Antrim I was case specific, Counsel for the Public submits there is insufficient basis to make such an interpretation of the SEC's ruling. In its ruling, the SEC stated as follows:

> In addition to physical mitigation, the Applicant submits that its overall environmental mitigation for the project consists of dedicating in excess of 800 acres of land in and around the Facility to conservation easements. Applicant's Post-Hearing Brief at 12. After consideration and deliberation, a majority of the Subcommittee found that the proffered mitigation does not appropriately mitigate the unreasonable adverse aesthetic impacts of the Facility. The physical mitigation efforts as described by the Applicant, while appreciated, are comparable to what is the standard design of any wind turbine facility in the region. The Applicant refers to the standard features of a modern wind turbine facility as mitigation. These features were considered by the Subcommittee in its review of this Application. A majority of the Subcommittee finds that the physical mitigation program cited by the Applicant is insufficient to mitigate the visual effects of this Facility on the regional setting and on the Willard Pond – dePierrefeu Wildlife Sanctuary area.
>
> Similarly, the Subcommittee finds that the offer of more than 800 acres of conservation easements in and around the proposed Facility is a generous offer by the Applicant. However, the dedication of lands to a conservation easement in this case would not suitably mitigate the impact. While additional conserved lands would be of value to wildlife and habitat, they would not mitigate the imposing visual impact that the Facility would have on valuable viewsheds.[36]

25. A review of the SEC's finding on off-site mitigation does not support the conclusion that this finding was case specific. There is no such statement in the SEC's Decision and Order. Further the Subcommittee's identification of three words "in this case" does not

[36] 5/12/13 *Decision and Order Denying Application for Certificate of Site and Facility*, Site Eval. Comm. No. 2012-01, pp. 51- 53.

warrant the conclusion that the SEC intended these words to mean that was a case specific context, and there is no rule of statutory or literary construction that would warrant such a conclusion. Those same three words have been used is hundreds, if not thousands of New Hampshire Supreme Court cases, without such an interpretation. The Subcommittee's ruling in this regard is unreasonable.

26. Finally the Decision references its deliberations citing "numerous changes" from the project that was proposed in Antrim I.[37] But the cited-to pages contain almost no discussion as to what the changes are and how they affect aesthetics. There is one sentence in the 15 pages cited that makes the conclusory statement that there are numerous changes from the "number of towers to lighting issues to conservation issues to differences in the amount of land impacted." [38] The number of towers is one less tower. The lighting issues referred to above presumably refer to the radar activated lighting for which there was no aesthetic analysis, (and which was required by the SEC in Antrim I). The conservation issues and amount of land impacted presumably refers to the additional 100 acres of conservation land. However, there is no articulation or findings as to how these changes materially impacted the aesthetics issues such that the doctrines of *res judicata* or *collateral estoppel* might not apply. See *Hill-Grant Living Trust*, 159 N.H. at 536 (allowing submission of modifications that meet [the SEC's] concerns)

27. Based upon the foregoing arguments, the Subcommittee's determination that *res judicata* and *collateral estoppel* are not applicable to this case is unreasonable and unlawful.

C. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES ON THE REQUIREMENTS FOR THE DECOMMISSIONING PLAN SUBMITTED BY AWE

28. The Subcommittee also approved the Decommissioning Plan proposed by AWE, which did not comply with the SEC's rules requiring removal of all infrastructure at depths of

[37] Decision at p. 50.
[38] Tr. 12/7/25, AM, p. 24.

less than four feet. This determination was unreasonable and unlawful.

29. The Subcommittee's (and AWE's) rationale for this divergence from the requirements of the rule was based on AWE's testimony that described this practice as typical in the industry, and documentary evidence of a Department of Environmental Services("DES") "Fact Sheet" issued by the DES Solid Waste Division describing burying concrete at a construction work site as a "best management practice."

30. As noted in Counsel for the Public's Post Hearing Memorandum[39] the SEC enacted new rules governing decommissioning that became effective in December 2016, and as noted above, these rules require removal of all infrastructure at depths of less than four feet. There is no exemption for concrete infrastructure. This rule is specific to decommissioning of energy facilities as opposed to DES general solid waste rules. Under the cannons of statutory construction, the SEC's rules apply to decommissioning – not the DES Solid Waste rules.

31. Moreover, the DES Fact Sheets relied upon by the Subcommittee are for information purposes only; they are not authority. Under the Solid Waste laws and regulations, this spent concrete infrastructure would fall within the definition of solid waste, and burying on site would constitute activities that would qualify as disposal for which a Solid Waste facility permit would be necessary. There is an exemption to the permitting requirement under the solid waste rules for concrete under certain conditions, those being that there is an assurance that there are no constituents of the concrete that would pose a threat to groundwater, and that the buried concrete be actively managed. From a practical standpoint this solid waste permit exemption may apply to a general construction site, but that is not to say that it should apply to a ridge top. Of concern is that the area of Tuttle Ridge is part of a valuable watershed. There was no

[39] See, Counsel for the Public's Post-Hearing Memorandum, 11/21/16, pp. 44-50 and hereby incorporated by reference.

consideration of whether the constituents of the crushed concrete would leach out and contaminate the groundwater. The Subcommittee did not undertake any analysis related to these conditions under the Solid Waste rules. So the Subcommittee disregarded both its own rules and the DES' Solid Waste rules. As such, the approval the Decommissioning Plan submitted by AWE was unreasonable and unlawful.

D. THE SUBCOMMITTEE FAILED TO FOLLOW ITS RULES AND IMPROPERLY GRANTED A WAIVER OF HEALTH AND SAFETY REGULATIONS CONCERNING SOUND, SHADOW FLICKER AND SETBACKS FOR COOPERATING LANDOWNERS

32. In the course of its deliberations, the Subcommittee waived its public health and safety rules related to sound, shadow flicker impacts and setbacks to avoid injury from ice throw, blade shear, and tower collapse as these health and safety regulations impact cooperating landowners.[40] N.H. CODE OF ADMIN. RULES SITE 301.14(f).

33. The Subcommittee found that its rules do not differentiate between participating and non-participating landowners.[41] But it determined that landowners have a right to voluntarily agree to subject themselves to "different environments." [42] As to the "different environments," the Subcommittee was presumably referring to exculpatory agreements between AWE and the cooperating landowners that purport to waive liability for possible health and safety impacts related to sound, shadow flicker and setbacks.

34. The Subcommittee's waiver of this rule was unreasonable and unlawful for several reasons. First, these types of agreements are generally not favored in New Hampshire. The New Hampshire Supreme Court has held that New Hampshire law generally prohibits exculpatory contracts. In an injury case, a party seeking to avoid liability must show that the exculpatory contract: 1) does not violate public policy. *Barnes v. N.H. Karting Assn.*, 128 N.H.

---

[40] Decision at pp. 168-169.
[41] *Id.* at 168.
[42] *Id.*

201, 106 (1986). In turn, the Court defined the public policy as indicating that no special relationship existed between the parties and that there was no other disparity in bargaining power. *Id.* In *Barnes* the Court held that "[w]here a defendant is a common carrier, innkeeper or public utility or is otherwise charged with a duty of public service, a defendant cannot rid itself of its obligation of reasonable care." *Id.* (emphasis added). These agreements can also be found to contravene public policy when they could be injurious to the interests of the public; violate a statute; or tend to interfere with public welfare and safety. *Serna v. Lafayette Nordic Village*, 2015 US. Dist. LEXIS 92669, 2015 DNH 138, p 4-5, citing *Barnes*, 128 N.H. 201, 106. Based upon the factors the Court outlined in *Barnes*, the exculpatory agreements AWE entered into with the cooperating landowners violate public policy because, at a minimum, one of the parties is a public utility. Further, among the liabilities being waived are the health and safety standards established by the SEC regulations.

35. However, under the holding in *Barnes*,[43] once the agreement is found to be objectionable as a matter of public policy, it can be upheld only if it appears: 1) that the releasing party understood the import of the agreement or a reasonable person in his or her position would have understood the import of the agreement; and 2) that the releasing party's claims would have been within the contemplation of the parties at the time of execution. *Id.* at 108. Also, the exculpatory contract must clearly state that the released party is not responsible for the consequences of its negligence. *Id.*; See also, *McGrath v. SNH Dev. Inc.* 158 NH 540, 542-543 (2009).

36. The Subcommittee did not undertake any part of the above-described analysis

[43] The *Serna* case implies that once an agreement is found to contravene public policy it is not enforceable, but there was no holding in either *Barnes* or *Serna* that the exculpatory agreements contravened public policy, so that appears unclear at this time.

with respect to the exculpatory contracts.[44] It also does not appear that the Subcommittee reviewed or examined the exculpatory contracts. The Committee simply waived its rules on its own motion under N.H. CODE OF ADMIN. RULES SITE 302.05 (waiver) *sue sponte* during deliberations.

37. Moreover, the SEC did not follow its rules for waivers. The Committee may waive its own rules under N.H. CODE OF ADMIN. RULES SITE 302.05 upon a motion or its own motion if it finds that: it serves the public interest; and (2) the waiver will not disrupt the orderly and efficient resolution of matters before the committee or subcommittee. N.H. CODE OF ADMIN. RULES SITE 302.05 (a)(1) & (2). In determining the public interest the committee shall waive the rule if compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or (2) the purpose of the rule would be satisfied by an alternative proposed method. N.H. CODE OF ADMIN. RULES SITE 302.05(b)(1) & (2). The Subcommittee made no such analysis.

38. As noted, in the Decision, the Subcommittee dismissed the noise and shadow flicker standards as "different environments." Under the SEC's regulations, those standards fall under the category of not simply "different environments" but "public health and safety." N.H. CODE OF ADMIN. RULES SITE 301.14(f) (unreasonable adverse effects on public health and safety). The Subcommittee did not make a finding that this waiver was in the public interest and it did not consider alternatives. It is difficult to reconcile the Subcommittee waiver under circumstances where they have made no determination such agreements are in the public interest particularly in light of the fact that these types of agreements are generally disfavored under New Hampshire Law as being against public policy. *Serna*, 2015 US. Dist. LEXIS 92669, 2015 DNH 138, p 4-5, citing *Barnes.*, 128 N.H. at 206.

[44] Tr. 12/09/16, PM, pp. 21- 25, 44-45.

39. Because the Subcommittee did not undertake any such analysis of the agreements, alternatives or the public interests involved the waiver of the public health and safety requirements for cooperating landowners is unlawful and unreasonable. *Id.*; N.H. CODE OF ADMIN. RULES SITE 302.05(a) & (b).

D. THE SUBCOMMITTEE FAILED TO FOLLOW THE STATUTORY REQUIREMENT OF HAVING A SEVEN MEMBER PANEL INCLUDING 2 PUBLIC MEMBERS TO ADJUDICATE THIS MATTER.

40. Further as noted *supra.*, Counsel for the Public joins the Intervenor Groups in their argument in their Motion for Re-hearing, to wit: the Subcommittee was not authorized to adjudicate this case or issue a decision because it was statutorily required to consist of seven members, two of whom are public members, and one of the public members was absent from thirteen days of hearing and the deliberations. RSA 162-H:4-a.

41. In addition to the arguments made by the Intervenor Group, Counsel for the Public submits that it cannot be said that the parties acquiesced to proceeding with a depleted panel because the Subcommittee made no mention of the absence of the public member from this panel or the reason therefor,[45] and the parties could not have known that the public member was not being provided with transcripts of the proceedings and would not be participating in the deliberations until the record was closed and deliberations were concluded.

42. For this reason as well, the Decision by the Subcommittee granting the certificate of site in facility is unreasonable and unlawful.

WHEREFORE, Counsel for the Public requests that the Subcommittee:

a. Grant this Motion for Re-hearing and Reconsideration

b. Deny AWE's Applications for Certificate of Site and Facility; and

[45] Counsel for the Public was not aware that the public member was on maternity leave until the close of the proceedings.

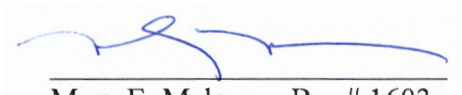
c. Grant such other relief as may be just.

Respectfully submitted this 17th day of April, 2017.

COUNSEL TO THE PUBLIC

By his attorneys

GORDON J. MACDONALD
ATTORNEY GENERAL

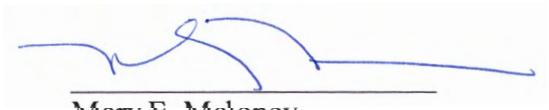


Mary E. Maloney, Bar # 1603
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
Tel. (603) 271-3679

Certificate of Service

I, Mary E. Maloney, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: April 17, 2017



Mary E. Maloney