

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2021-01

**Petition for Jurisdiction
Over Proposed Solar Energy Facility in Milford, NH**

JURISDICTIONAL DECISION AND ORDER

November 10, 2021

Brox Environmental Citizens (“Brox”) has petitioned the Site Evaluation Committee (“SEC”) to exercise jurisdiction over a solar energy facility proposed by Milford Spartan Solar, LLC (“Spartan”). After reviewing the evidence presented in light of the applicable legal standard, the SEC voted unanimously to find that Brox had not met its burden to establish a basis for the SEC to exercise jurisdiction over Spartan’s proposed facility. For the reasons that follow, Brox’s petitions are denied.

A. Procedural Background

On December 3, 2020, Brox filed two petitions for jurisdiction under RSA 162-H:2, XII, asking the SEC to exercise jurisdiction over a 16-megawatt solar energy facility proposed by Spartan. Tab No. 1¹. One petition is “endorsed by 100 or more registered voters in the host community,” RSA 162-H:2, XI(a); the other is “endorsed by 100 or more registered voters from abutting communities,” RSA 162-H:2, XI(b). Brox considers itself exempt from a filing fee under RSA 162-H:8-a, IV. According to the cover letter filed with the petitions, Spartan proposes to site, construct, and operate a solar energy facility (the “Facility”). The Facility to be located on 83 acres in the Town of Milford, west of downtown,

¹ Documents filed in the docket of this case are posted on the SEC’s online docket available at <https://www.nhsec.nh.gov/projects/2021-01/2021-01.htm> and sorted by Tab number.

south of the Route 101 Milford Bypass, east of Brookview Drive, west of Osgood Road, and north of Mason Road. The Facility is expected to have an installed nameplate capacity of greater than 5 MW but less than 30 MW. The petitions seek a determination by the Committee that a certificate of site and facility is required for the proposed generating facility.

The SEC acknowledged its receipt of the Petition on December 29, 2020. Tab No. 2. On February 2, the Chair of the SEC issued a Notice and Order convening an adjudicative proceeding and on February 19 appointed a subcommittee to hear the matter. Tabs No. 3 and 4. An initial Procedural Order and Notice of Prehearing Conference was issued on March 5, 2021, Tab No. 5, setting a prehearing conference for March 15 and a deadline for motions to intervene of March 22. Subsequent to the prehearing conference, further motion deadlines were set in the prehearing order and an initial procedural schedule issued on March 19. Tab No. 8. Brox filed a Motion for Clarification of the Prehearing Order on March 24, seeking an order clarifying that Brox qualifies as two petitioners under RSA 162-H:2, XI. Tab No. 9.

The Subcommittee received one unopposed motion to intervene by the Town of Milford. Tab No. 7. On March 26, Spartan filed a Motion to Dismiss Petition for Jurisdiction, Tab No. 11, which was joined by the Town of Milford, Tab No. 12. On April 9, Brox filed an Objection to the Motion to Dismiss Petition for Jurisdiction, Tab No. 13, and shortly thereafter filed a Motion to Amend the Petition to Remedy Deficiencies. Tab No. 14. Spartan filed an Objection to the Motion to Amend the Petition on April 22. Tab No. 15.

On May 20, 2021, two orders were issued. The Presiding Officer denied both Spartan's Motion to Dismiss and Brox's Motion to Amend. Tab No. 17. The Presiding Officer also granted the Town of Milford's intervention request and Brox's motion for clarification. Tab No. 18.

By Order on June 10, 2021, the Presiding Officer scheduled an adjudicative hearing for June 23, 2021. Tab No. 19. However, on June 18, 2021, the adjudicative hearing was postponed and in lieu of a hearing, a second prehearing conference was scheduled. Tab No. 20. Following the second prehearing conference, Spartan filed an Assented-To Motion for Deliberations that provided the parties agreement regarding further filings, the record, evidence, witnesses, and scheduling an adjudicative hearing. Tab No. 21. In keeping with the Assented-To Motion, Brox filed a Supplemental Filing in Support of Petition on July 2. Tab No. 22. The Presiding Officer issued a second Prehearing Order and Notice of Adjudicative Hearing on July 4, setting a July 26 hearing date. Tab No. 23. On July 9, Spartan filed its Reply to Brox's Supplemental Filing. Tab No. 24. And, at the request of the parties, the Presiding Officer rescheduled the adjudicative hearing date, issuing a notice on July 23, setting the hearing date for August 19. Tab No. 25. On August 17, a supplemental notice was issued providing additional details regarding remote access to the hearing. Tab No. 26. An adjudicative hearing was held on August 19, 2021.

B. Position of the Parties

1. Brox Environmental Citizens ("Brox")

Brox requests that the SEC assert is discretionary jurisdiction over the proposed facility. Brox offers that in deciding whether to assert jurisdiction, the SEC must consider whether a certificate is required to meet one of the following criteria:

- (1) Maintain a balance between the environment and the need for new energy facilities in New Hampshire;
- (2) Avoid undue delay in the construction of needed facilities and provide full and timely consideration of environmental consequences;
- (3) Ensure that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and
- (4) Ensure that the construction and operation of energy facilities are treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

In its cover letter to the two submitted petitions, Brox identifies eight “Benefits to the Public” that will occur if the SEC asserts jurisdiction:

- Evaluation the sufficiency of the financial, technical, and managerial capabilities of the Company;
- Determination whether the Project interferes with orderly development of the region;
- Evaluation of adverse effects to aesthetics, such as visibility of the solar array from the nearby Heron Pond Elementary School;
- Evaluation of impacts there might be to the recreational trail network and impacts to the trails themselves that fall within the 83-acre Site;

Evaluation of the impacts to air and water quality from large-scale deforestation;
- Evaluation of the effects on wetlands of solar panels that would be installed on both sides of Birch Brook and its associated wetlands; and
- Evaluation of the effects on vernal pools and vernal-pool-dependent wildlife, as well as the overall functioning of the wetland complex of interrelated and interdependent uplands and wetlands.

Tab No. 1 at 4–5; *see also*, Tab 22 at 2–3.

In support of its assertion that the SEC should assert jurisdiction over the proposed facility, Brox has filed multiple documents. With its original cover letter, Brox included the following six enclosures:

- Petition #1 signed by certified registered voters in Milford
- Petition #2 signed by certified registered voters in towns abutting Milford
- Notes of certification of town clerks in abutting towns of: Amherst, Brookline (email), Hollis and Wilton.
- The Milford Planning Board's Conceptual Review packet for discussion of the construction of 16 Megawatt (MW) photovoltaic solar energy generating facility utilizing 83.05 acres of the 221 leased acres, 5/14/20; Milford Spartan Solar, LLC, Tax Map 38, Lots 4, 5, 5-1, 9, 11, 12, 13, 14 and Map 39 Lot 74.
- Olivewood Energy's Conceptual Review presentation to the Planning Board, May 19,2020
- Olivewood Energy's Quarterly Update Regarding Permitting Progress, 9/23/20

Additionally, attached to its Objection to Spartan’s Motion to Dismiss, Tab No. 13, Brox included a 57-page report prepared by FB Environmental Associates titled “Brox

Property, Milford New Hampshire Natural Resources Inventory and Recommendations.” And in its Supplemental Filing in Support of Petition, Brox filed the following 19 exhibits, which are available at Tab 22.

In addition to the eight benefits to the public that Brox alleges support SEC jurisdiction, Brox argues that the Town of Milford and its various municipal bodies are not inclined to ensure the construction and operation of the proposed facility are treated as significant aspects of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. Brox alleges the Town’s Planning and Zoning Boards are biased as a result of significant conflicts of interest stemming from the potential financial gain from the project. Brox argues that the Boards cannot effectively balance competing site evaluation and permitting criteria against the Town’s potential financial gain. Additionally, a specific member of the Town’s Planning Board is alleged to have such significant connection with the proposed site that he has pre-judged the application and exercised outsized influence. According to Brox, to avoid undue delay, the SEC should assert jurisdiction to remove consideration of the project to a neutral body (the SEC).

Brox further argues the Town is ill-equipped to review and permit the facility in keeping with RSA 162-H:1. Brox asserts the project could have a significant impact on the electric grid, which the Town is not qualified to evaluate. Although Brox acknowledges the Town of Milford has a Solar Collection Systems ordinance, Brox states that the ordinance lacks specificity and is untested. According to Brox, the ordinance is not designed to address all of the issues that are captured by RSA 162-H:1. *See* Tab No. 13 at 6; *see also* Tab No. 14, 9–12.

Brox further calls into question the Town’s ability to treat the proposed facility as a significant aspect of its land use planning through reference to a separate past project in Milford. Although unrelated to energy facility siting, the separate project (a gravel

operation) was permitted in the vicinity by both the Town of Milford and State. But after a permit appeal and ruling by the NH Supreme Court, a critical Alteration of Terrain permit was rescinded, shuttering the gravel operation. Not only does Brox use this example to highlight that, in Brox's opinion, the Town cannot be trusted, but to bolster its argument that independent review, outside of the SEC process, by NHDES and NH F&G is inadequate as both agencies were involved in issuing permits for the gravel operation.

Taken as a whole, Brox argues that SEC jurisdiction is appropriate as adequate protections of the objectives of 162-H:1 do not exist for this proposed facility and "not all environmental impacts or effects are adequately regulated by NHF&G and NHDES or by local regulations, including the [Town of Milford's] solar zoning ordinance."

2. Milford Spartan Solar, LLC. ("Spartan")

Spartan, the developer of the proposed solar facility, requests the Subcommittee find SEC jurisdiction unwarranted and unsupported.

In its Motion to Dismiss, Spartan describes the project as a 16 MW solar electric facility to be constructed on approximately 83 acres within the Town of Milford. Of the 83 acres, 36 acres are anticipated to be on Town-owned land are zoned Integrated Commercial-Industrial 2 ("ICI-2"), which Spartan notes permits solar projects subject to application to the Town's Planning Board for a Conditional Use Permit and Site Plan Approval. The remaining 47 acres of the proposed project site are on part of one 101-acre, privately-owned parcel, which is zoned Residential. Spartan presented the conceptual design to the Town's Planning Board and submitted an application for a variance to permit construction of a utility scale solar collection system on a parcel in a residential zone; per Spartan the Town's Zoning Board of Adjustment approved the variance application on July 2, 2020. Spartan also asserts that it has held numerous meeting with local officials, including the Town Administrator, Select Board, Planning Board, and Zoning Board of Adjustment. Per Spartan, through public Select Board meetings, it has negotiated a land

lease option agreement with Spartan and approved a payment in lieu of taxes (“PILOT”) agreement. Spartan asserts that these efforts reflect its extensive interaction with the Town and its willingness to share information.

Spartan specifically argues that asserting SEC jurisdiction over the project would run counter to one of the goals of RSA 162-H:1 as it would create, rather than avoid, undue delay. Spartan also asserts that SEC jurisdiction is not needed to ensure full and complete disclosure to the public of its plans, arguing that the current process within the Town demonstrates Spartan has consistently made information regarding the proposed facility available to the public. Spartan has presented at nine public meetings or hearings describing the proposed facility. Spartan acknowledges it has not fully disclosed contractual agreements with third parties, but Spartan argues SEC jurisdiction would provide no greater public disclosure as the SEC has routinely held third party contractual agreements and corporate ownership details are confidential business information, exempt from the requirements of RSA 91-A (e.g. public disclosure).

Spartan also highlights that the Town of Milford has a zoning ordinance specific to the development of solar projects.² Spartan notes that the Town process requires input from State agencies. Spartan argues that the Town of Milford has the necessary procedures in place to appropriately handle review of the proposed project, that the town is capable of conducting the review, and that the town has expressed its desire to do so. Spartan points to past SEC decisions to support that the Subcommittee should focus on whether the municipality (or municipalities) had an applicable land use ordinances to address proposed projects.

² Town of Milford Zoning Ordinance (<https://www.milford.nh.gov/zoning-board-adjustment/files/zoning-ordinance>).

Specifically, Spartan describes the Town's zoning ordinance regarding solar project development as detailed and adequate to address issues regarding the orderly development of the region as well as the other criteria consistent with those that would be considered in an SEC certificate proceeding. Spartan notes that the purpose section of the Town ordinance states that the purpose is "to accommodate solar energy collections systems...in appropriate locations, while protecting the public's health, safety and welfare, and the environment." The ordinance also includes provisions requiring a potential project developer to assess and address environmental concerns related to tree clearing, stormwater and erosion control, as well as impacts to natural resources. As for aesthetic considerations, Spartan argues the ordinance contemplates consideration of potential impacts to scenic resources, including requiring solar collection systems be "visually screened through the preservation of existing vegetation" and consideration of glare on abutting structures and roadways.

Spartan also supports its argument that discretionary jurisdiction is unwarranted by arguing that it is already working with the State agencies that would be involved in an SEC certificate proceeding, including NHDES, NHF&G, and the NH Division of Historical Resources ("DHR"). In response to Brox's environmental concerns Spartan repeatedly asserts that Town review, coupled with the State agency consultation and review that is occurring or required by ordinance, will ensure that environmental resources are sufficiently protected.

Finally, Spartan disagrees with Brox that alleged bias should be a factor as to whether the SEC asserts jurisdiction. Spartan argues that Brox's argument of Town bias would lead to an absurd result as municipalities could be barred from reviewing project that financially benefited their community. Spartan further argues that the allegations of bias against the planning board member are unsupported or, in the alternative, Brox should have sought disqualification of the planning board member, not SEC jurisdiction.

3. Town of Milford. (“Milford”)

After seeking intervention, the Town of Milford joined Spartan’s Motion to Dismiss Petition for Jurisdiction. In its notice joining Spartan’s motion, the Milford asserts that SEC jurisdiction is unwarranted for the reasons stated in Spartan’s motion. *See* Tab No. 12, page 1, paragraph 3.

C. Analysis

The New Hampshire Site Evaluation Committee has discretionary authority to assert jurisdiction over a renewable energy facility that has a nameplate generating capacity of at least 5 megawatts but a maximum capacity of 30 megawatts. *See* RSA 162-H, XI, XII. The Site Evaluation Committee will only exercise its discretion to assert jurisdiction over such an energy facility if it determines that asserting jurisdiction is “consistent with the findings and purpose set forth in RSA 162-H:1.” *See id.*

1. Legal Standard

As noted above, the findings and purpose of RSA 162-H:1 guide the Subcommittee as to when to assert its discretionary jurisdiction. This statutory provision offers the following:

The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air, and water quality, the use of natural resources and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of new energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:1. Accordingly, in order to decide whether to assert jurisdiction over a facility, the Subcommittee must determine whether asserting jurisdiction and requiring the project receive a certificate of site and facility is needed to:

- maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire;
- avoid undue delay in the construction of new energy facilities;
- provide for full and timely consideration of environmental consequences;
- ensure the full and complete public disclosure by entities planning to construct energy facilities in the state of such plans; and
- ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion

2. Findings of Fact and Conclusions of Law

The SEC has reviewed all documents submitted into the record of this proceeding and considered all testimony taken at hearing. Based upon this review and consideration, the SEC makes the following the determinations:

a. Balancing of the RSA 162-H:1 factors

Brox has not met its burden to establish that the SEC's discretionary jurisdiction is necessary to balance the interests articulated in RSA 162-H:1. On this point, Brox's arguments may be separated into two categories: (1) an allegation that the town's forecasted gains in tax revenue attributable to the development render its permitting and planning boards unable to adjudge the development impartially; and (2) an allegation that one planning board member is biased because he formerly prior owned of one of the parcels involved in the development. Neither argument persuades the SEC that its discretionary jurisdiction is necessary.

Brox's first argument does not identify any way in which Spartan's development in Milford is different from any other municipal zoning or planning board's review of projects that have the potential to generate tax revenues for their towns. Taking Brox's assertions at face value, it would appear to be beyond dispute that Milford's boards considered at least the economic and industrial factors of RSA 162-H:1. It is not at all evident based upon the record of evidence introduced by Brox that Milford's boards refused to consider the other factors. See Tr. 35:10-15. RSA 162-H:1 envisions a balancing of the many factors but cannot be read to entitle a petitioner to its preferred outcome of that balancing. Moreover, Spartan's involvement of the New Hampshire Department of Environmental Services (DES), Fish & Game Department (F&G), and Division of Historic Resources (DHR) is strong evidence that the environmental and historic interests are being reviewed by state agencies specifically charged with safeguarding those interests.

Brox's argument about Mr. Amato, the planning board member who previously owned land involved in the development, is similarly unpersuasive. Brox has articulated no theory by which Mr. Amato's prior ownership of the parcel could improperly influence his decision-making over the subsequent owner's use of that parcel. Because Brox has shown by a preponderance of the evidence that it is necessary for the SEC to exercise jurisdiction in order to ensure that the RSA 162-H:1 factors are balanced, the SEC declines to do so.

b. Undue delay

Brox has not advanced any argument that SEC jurisdiction will prevent undue delay³ in the construction process. Because it is not part of Brox's petition, we need not address this factor.

³ To the extent there is any evidence on this matter in the record, it suggests that an assertion of SEC jurisdiction would result in additional delay. Because, however, Brox has not advanced

c. Consideration of environmental consequences.

Brox's argument on this point is similarly unpersuasive. At hearing, Brox's attorney acknowledged that state-level permitting by DES and F&G would take potential environmental consequences into consideration, but asserted unspecified risks that the state agencies would "fall short on these things" and a concern that the Town's focus on permitting would in some way lead to this factor not being adequately considered. To the first argument, a petitioner must assert more than a vague concern that state agencies will fail to uphold their statutory obligations to overcome its burden of proof. To Brox's second point, the SEC need only consider exercising jurisdiction if it appears that the environmental consequences will not be considered. It is not enough that the environmental consequences might not be considered to petitioner's satisfaction by any one particular entity. This argument does not provide a basis for the SEC to exercise discretionary jurisdiction.

d. Full and complete disclosure to the public of development plans

Brox has advanced its disclosure to the public argument in only the vaguest of terms. *See Pet'r's' Obj. to Mot. to Dismiss* at p. 16 ¶¶ 41–42. It did not provide any substantial further argumentation on this point at hearing. Spartan has identified nine public meetings or hearings at the town through which it disclosed its development plans in detail. Its forthcoming applications with other state agencies will provide additional opportunities for public disclosure. Because Brox's arguments to the contrary are cursory and conclusory, it has not met its burden on this point.

e. Integrated resolution of factors

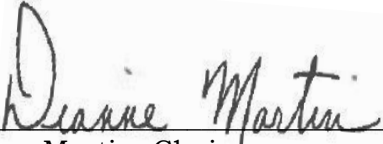
this argument as part of its petition, we need not inquire into whether that delay would be "undue."

Brox has not advanced a discrete argument on this point and the SEC, therefore, need not make a specific finding on this issue.

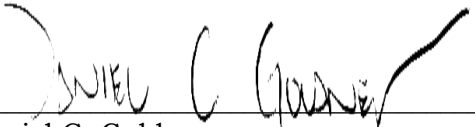
D. Conclusion

Based upon the foregoing, the SEC determined that it is not necessary to exercise our discretionary jurisdiction pursuant to RSA 162-H: 2, XII with respect to the proposed Project. Therefore, the Petition for Jurisdiction is hereby **DENIED**.

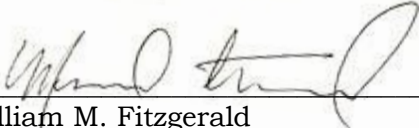
SO ORDERED, this tenth day of November, 2021.




Dianne Martin, Chairwoman



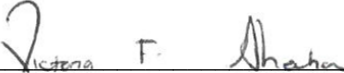
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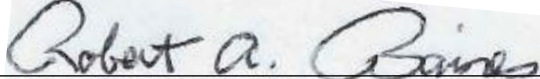
William M. Fitzgerald



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