

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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October 6, 2023

Daniel C. Goldner, Chairman
New Hampshire Site Evaluation Committee
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Mr. Jonathan A. Evans
Presiding Officer
New Hampshire Site Evaluation Committee, Subcommittee
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301-2429

RE: Counsel for the Public – Further Comments on Investigation of Complaints
Regarding Antrim Wind Energy Facility (Docket No. 2021-02)

Dear Chairman Goldner and Presiding Officer Evans:

Thank you for your work in the above-captioned matter. I was unable to attend the meeting of the Subcommittee held on September 1, 2023. It appears that one day before that meeting, data regarding operation of the Aircraft Detection Lighting System (“ADLS”) as well as a document entitled “Summary of Investigation” were posted on the website for the N.H. Site Evaluation Committee (“SEC”). I did not receive this information directly and, therefore, was not aware of it prior to the meeting.

In reviewing the minutes for the September 1, 2023 meeting, I note that the Subcommittee members stated they adopted the “investigative finding and report by Administrator Andrew Biemer.” At the same time, the Subcommittee recommended “no further action” on complaints related to the ADLS. The publicly-available “Summary of Investigation” from Administrator Biemer does not include findings; therefore, it appears that the statement by the Subcommittee referring to an “investigative finding and report” may refer to another document. Please provide me with any such document that has been circulated to a quorum of the Subcommittee or that is otherwise publicly available. I also ask that, for purposes of transparency, you publish this report in the above-captioned docket.

Given the data related to operation of the ADLS, a finding that no further action be taken is patently incorrect. The data demonstrates that, on average, the lights regulated by the ADLS were on during nighttime hours 43.22% of the time.¹ That occurred during a two-year span beginning *after* the facility had already received complaints about the ADLS and *after* a prior Subcommittee felt that it had addressed the issue.

Overall, during this period, the ADLS did not operate for more than 8 consecutive months without experiencing total failure, the latest of which lasted for several months and did not end until almost June of this year. These failures occurred well after the Antrim Wind Facility first asserted to a prior Subcommittee that the system was simply in a period of “shakedown” and that these types of operational difficulties were common at startup. At this point, it appears that complete failures constitute a normal, predictable, and seemingly long-term operating condition at the facility. Operation during periods other than complete failure is also poor. Although performance after the most recent period of complete failure appears to be better than the total average, the ADLS still triggers illumination more than 20% of the time. This percent appears to be trending upward.

At a recent meeting, counsel for the Antrim Wind Facility reasserted its prior position that its SEC Certificate only requires installation of the ADLS, not operation of the ADLS. At the September 21, 2021 meeting, counsel for the Antrim Wind Facility again restated this position along with the position that the ADLS system performs in a manner that provides for public safety which, Antrim Wind says, is its purpose. Specifically, counsel for Antrim Wind stated:

It’s clear from the record that ADLS was an emerging technology at the time of the proceedings. And it’s also clear that the FAA’s focus is on safety, and at no time has public safety been at risk due to the operation of the ADLS. The ADLS system is set up, when there are -- any issue arises, whether it’s an equipment failure or a detection of any movement of any sort, that the lights are activated. And the focus is on public safety, and that’s the way that the system has been operating.

Comments like these that assert that the lighting triggered by the ADLS provides for public safety are non sequitur. If safety were the only concern, the lights would be left on all the time. The purpose of the ADLS is to ensure that the lights are *off* as much as possible. Similar comments asserting that the mere physical existence of the ADLS, rather than its successful operation, satisfies the Certificate are an affront to those living in the community who participated in the certification process and who now have to tolerate the lights being on far in excess of what the Certificate allows.

¹ The “Summary of Investigation” also includes a calculation of the median time of illumination. However, a median time for illumination does not seem useful under these circumstances.

Please see my prior letter on this point dated May 21, 2021 (attached as Exhibit A). I note that although I addressed the prior letter both to the full SEC and to the Subcommittee, it was not published in the Subcommittee docket. So that there is no confusion, I ask that this letter, which includes my letter of May 21, 2021 as an attachment, be published both on the main SEC page and the Subcommittee docket.

To summarize my prior position, I simply do not accept statements that it is sufficient for the system to be in place even if it is not operating in a manner that at least approximates what was promised by the applicant. The SEC allowed the Antrim Wind Facility to forgo the visual impact analysis required by rule based on its assertion that the ADLS would work to achieve a result where “for the most part, there will be no lighting at night of the facility.” Even at its best performance, the lights at the facility are on, on average, approximately two hours per night, every night.² This poor performance combined with continuing periods of complete shut down demonstrate that the ADLS has failed.

Current conditions significantly deviate from the proposal approved in the Certificate. The SEC should, therefore, find that the facility does not meet the requirements of the current Certificate. Consequently, the SEC should either require the Antrim Wind Facility to undertake the visual analysis required by rule that it should have undertaken during certification, and mitigate impacts identified in the analysis, or determine what further actions should be taken to achieve compliance.

Thank you for your time and attention to this matter.

Sincerely,



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Enclosure

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² The raw data provided should also include more information regarding time periods. Many entries do not indicate during what nighttime period measurements were taken at all; many others appear to begin well after sunset including after midnight.

EXHIBIT A

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May 21, 2021

Chair, Public Utilities Commission
Dianne Martin, Chairwoman
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Mr. Jonathan A. Evans
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RE: Counsel for the Public – Comments on Investigation of Complaints Regarding Antrim
Wind Energy Facility
(Docket No. 2021-02; Docket No. 2015-02)

Dear Chairwoman Martin and Presiding Office Evans:

On May 21, 2021, a Site Evaluation Subcommittee (“Subcommittee”) charged with investigating alleged complaints of, among other things, project lighting held a public meeting. Previously, the Subcommittee established a deadline of May 18, 2021, for any written submittals and precluded live testimony or comments at the meeting. Antrim Wind Energy, LLC (“Antrim Wind”), submitted comments prior to the deadline as required, specifically at 4:30 p.m. on May 18, 2021. Antrim Wind made an additional submittal on the ongoing sound issue unrelated to the public meeting on May 20, 2021. The Subcommittee reviewed all relevant information and will soon make a recommendation to the full Site Evaluation Committee.

Turbine Lighting

Counsel for the Public has no issue with the Subcommittee’s pragmatic approach to the current problem related to the Aircraft Detection Lighting System (“ADLS”). However, having reviewed the submittals of Antrim Wind and listened to the Subcommittee discussion, Counsel for the Public believes that it may be beneficial to the Subcommittee and to the full Site Evaluation Committee to be made aware of its position on certain standards.

In its May 18, 2021 submittal, Antrim Wind states that in order to comply with its Certificate of Site and Facility (“Certificate”), it need only submit approval of the ADLS from

the Federal Aviation Administration (“FAA”) and abide by the FAA’s Determination of No Hazard to Air Navigation. Specifically, Antrim Wind states:

In summary, the Certificate required that Antrim Wind do two things with respect to turbine lighting, which are set forth in full in Section III below. Antrim Wind has complied with both conditions by (1) filing with the Site Evaluation Committee (“SEC”) the Federal Aviation Administration’s (“FAA”) approval of Antrim Wind’s Aircraft Detection Lighting System (“ADLS”) and (2) abiding by the FAA’s Determinations of No Hazard to Air Navigation.

Therefore, Antrim Wind is not in violation of its Certificate.

Antrim Wind submittal, pg. 1. Antrim Wind restates this position later in its letter:

Antrim Wind has fully complied with its Certificate. Antrim Wind was required by the SEC to do two things: (1) comply with the conditions of the FAA Determinations of No Hazard to Air Navigation, which it has, and (2) file with the SEC Administrator, on receipt, the FAA’s approval of the ADLS, which it did.

Id. at 6-7. Antrim Wind appears to argue that, although it is working in good faith to ensure a functioning ADLS, these efforts are essentially gratuitous. This position is troubling and may be problematic if future issues with lighting arise. Specifically, if this position is accepted, Antrim Wind is under no obligation to ever properly run the ADLS.

Although it is true that two conditions of the Certificate require the measures described above, the argument that this achieves compliance is contrary to the terms of RSA ch. 162-H, the order granting the Certificate, and the Certificate itself. The proper functioning of the ADLS, and the positive impacts this would have, were material parts of Antrim Wind’s application. This fact was so important to the application process that the applicant, Antrim Wind, and the Site Evaluation Committee relied on it to satisfy, or supersede, N.H. Admin. R. Site 301.05(b)(9). That rule requires:

If the proposed facility is required by Federal Aviation Administration regulations to install aircraft warning lighting or if the proposed facility would include other nighttime lighting, a description and characterization of the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points....

During testimony, when asked about Site 301.05(b)(9), a witness for the applicant stated:

We did not need to address this issue because the project developers have committed right from the outset to use the radar activated lighting which means that, for the most part, there will be no lighting at night of the facility. So it’s not necessary to evaluate that in depth.

Docket No. 2015-02, Transcript, Day 5, Afternoon at pgs. 57-58.

The Site Evaluation Committee relied on this representation when it issued its Decision and Order Granting Application for Certificate of Site and Facility (“Order”) stating: “*In addition* [to the applications to the FAA], the Applicant agreed to *utilize* a radar activated lighting control system, Aircraft Detection Lighting System, (ADLS), once approved by the FAA.” Order, pg. 154 (emphasis added). The Order also references an agreement with the Appalachian Mountain Club that relates to lighting. That agreement refers to operation of, not just approval for, the ADLS stating that “AWE shall install and *operate* the Radar System,” “AWE shall be required to implement and *operate* the Radar System,” and “AWE will commence with *operation* of the Radar System as soon as commercially reasonable” *Id.*, pg. 154-155 (emphasis added). Finally, the Order states:

The Subcommittee finds that the light associated with operation of the Project will not have an unreasonable adverse effect on health and safety *if* the Project will be equipped with the ADLS. In reaching this conclusion, the Subcommittee considered that the Project’s lights *will be radar operated*, to secure their safe operation, and the Applicant will have to receive prior approval from the FAA for the installation of the ADLS.

Id., pg. 156 (emphasis added).

In addition, the very first condition of the Certificate states: “[I]t is hereby ORDERED that the *Application* of Antrim Wind Energy, LLC, as amended, *is approved*....” Certificate, pg. 2 (emphasis added). In other words, the project *as requested* has been approved. Material impacts under the jurisdiction of the Site Evaluation Committee must be addressed in the application and cannot be unilaterally modified thereafter. Specifically, RSA 162-H:7, IX states: “The applicant shall immediately inform the committee of any substantive modification to its application.” Changing the project to no longer include functional ADLS lighting would be just such a change. If Antrim Wind wishes to modify its project, there is a process for doing so; however, construction or operation of a project that is materially different than the project applied for is a violation of the statute, the Order, and the Certificate.

Enforcement of the Certificate

Antrim Wind seems to suggest that complaints from members of the public should not be acted upon if they request an improper procedure or ask for actions outside of the specific relief available at the moment. Members of the public may not precisely understand the procedural constraints in all sections of the statute and rules. This does not render a complaint infirm. The Site Evaluation Committee has the tools necessary to determine an appropriate outcome.

The Site Evaluation Committee should keep in mind that violations of the Certificate need not necessarily result in revocation or suspension. Such action is discretionary. *See* RSA 162-H:12 (stating that the Site Evaluation Committee “may” take action).¹ In addition to

¹ Counsel for the Public is aware that Site 302.01 includes the mandatory word “shall”; however, to the extent that the rule contradicts the statute, the statute takes precedence. The Site

revocation or suspension, the statute provides for appropriate injunctive relief or penalties. RSA 162-H:19. Finally, not every deviation from the requirements of the Certificate must be considered a violation. The Site Evaluation Committee can determine whether a deviation from the requirements of the Certificate or approved project are reasonably within the scope of what was approved. For instance, if a project with lighting is approved, it is reasonable to believe that a bulb may burn out and be replaced and that such a circumstance is reasonably within the bounds of the permitted activity.

Issues Related to Sound

Counsel for the Public may make future comments on issues relating to sound measurement.

Thank you for your time and attention to this matter.

Sincerely,

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Evaluation Committee can also waive this rule if necessary. Taken as a whole, the enforcement mechanisms in RSA ch. 162-H serve as tools to achieve a just result.