

## MEMORANDUM

To: Governor's Energy Generation Siting Policy Commission  
From: Billy Coster, Senior Planner and Policy Analyst, Vermont Agency of Natural Resources  
Date: January 13, 2013

As a statutory party to the Public Service Board's Section 248 review, the Vermont Agency of Natural Resources has provided evidence and recommendations on energy generation projects for which the developer has already selected the project site. The Agency's involvement, in "siting decisions" or informing or influencing whether or where a project is sited, therefore, has been limited. Generally, a developer approaches the Agency after it has selected a site or location for its project. The Agency then attempts to minimize the natural resource impacts from that project in that selected location. Although the Agency can help minimize impacts from these projects, the current process hinders or eliminates the ability of the Agency and the Board from recommending the avoidance of these impacts through a site selection process. There are, however, opportunities to improve the process and we appreciate the commission's efforts to reach out to other states, experts and the citizens of Vermont in formulating your recommendations.

The Agency supports the Commission's work and is very interested in working with the Commission, the Board, the public and other parties to develop recommendations that improve the energy generation siting process in Vermont. The Commission has requested the Agency provide written comments related to the siting process. What follows are general observation and recommendations for the Commission to consider. This is not an exhaustive list, but it largely captures the main recommendations from the Agency's perspective, which are:

1. Develop a project scoping process that is required pre-petition.
2. Assign a 'case manager' to projects at the beginning of the scoping phase.
3. Provide technical support to impacted municipalities for large generation proposals (>15MW).
4. Set docket schedules that allow for concurrent review of CPG and other collateral permits.
5. Defer to Agency recommendations regarding natural resource impacts.
6. Expand the composition of the Board to include an Agency and regional representative for siting decisions related to large generation proposals (>15MW).
7. Establish and apply clear standards to the consideration of certain impacts.
8. Increase the Board's monitoring and enforcement capacity.
9. Establish an application or license fee.
10. Consider cumulative impacts.

As the Agency continues to engage in and learn from the Commission process, we will inevitably revisit these comments and offer new recommendations for your consideration.

1. **Formalized Scoping Phase:** Vermont would benefit from a formalized scoping period. The Board should institute a formal scoping phase and establish a set of minimum guidelines for public engagement and natural resource assessment activities that would need to occur prior to the filing of a petition. The minimum guidelines could be scaled depending on the size and complexity of the project. For small to medium size generation facilities, the guidelines would at a minimum ensure that petitioners had completed all necessary environmental due diligence and public notice prior to application. For larger project – 15MW or larger – the guidelines would call for a robust public engagement process with affected communities. In New York

State, the interested public works with the petitioner to reach consensus on what pre-file studies are required for the project and on which consultants are hired to conduct that work. Providing all parties the opportunity to influence and ultimately approve how these studies are conducted will reduce the likelihood that the results of the studies are contested during the formal proceedings. The scoping phase also provides parties the opportunity to give feedback and potentially influence the siting and design of projects at an early stage of development.

Petitioners would need to file a scoping plan with the Board that meets or exceeds the minimum guidelines. This filing would put communities and all interested parties on notice of a potential project – deadlines for filing this scoping plan could vary depending on the size and complexity of the project with deadlines for large projects several months to a year out and much shorter for smaller projects. Prior to the filing of this plan, the Board may also require Petitioners to provide notice to Board, statutory parties and affected municipality 30 days prior to assuming site control over the proposed plant location. Providing notice before the Petitioner is legally bound to a parcel may provide the opportunity to flag and avoid particularly problematic locations prior to any substantial investment in a given site.

Public outreach and environmental due diligence already does occur for many large generation projects in Vermont, but the process is not required by the Board and there is no formal structure that sets forth what is expected of the Petitioner. Developers of large wind generation projects typically begin natural resource assessment work several years in advance of any filing. While the Agency is often consulted during this environmental pre-development phase, there is no formal role for the public. A scoping period required by the Board that includes a clear timeline and benchmarks would result in more meaningful community engagement, predictability for developers and would increase the public's understanding of the Agency's role in the pre-petition review of generation projects, improving the overall transparency of the process.

If the Board chose to develop their own scoping phase guidelines, ANR would be interested in working with the Board and the Department to develop a procedure for natural resource assessment and review for generation projects at different scales. The Board may also choose to include in the guidelines a procedure or check-list to assist municipal or regional planners with the review of proposals during this scoping phase.

The Board may also choose to include certain benchmarks in the scoping phase, which must be satisfied before the project can move ahead with a full application. For example, the U.S. Fish & Wildlife Service has developed voluntary land-based wind energy guidelines that use a tiered, iterative approach to assess potential effects to fish and wildlife. Each tier has a resource-based benchmark the project must reach to move to the next tier. If the project cannot attain the benchmark, the guidelines suggest it go back to for more study or redesign, or ultimately be abandoned. These guidelines were developed in conjunction with the wind industry and state natural resource agencies. The USFWS guidelines can be found here:

[http://www.fws.gov/windenergy/docs/Final\\_Wind\\_Energy\\_Guidelines\\_2\\_8\\_11\\_CLEAN.pdf](http://www.fws.gov/windenergy/docs/Final_Wind_Energy_Guidelines_2_8_11_CLEAN.pdf)

By front loading certain threshold decisions in the scoping phase, the Board may avoid petitions that are fatally flawed, but that would still require significant investment of time, energy and money from all parties to work through the process. Agency staff already invest significant time

and resources vetting large projects during the pre-development phase, but the results of that vetting hold limited weight with the applicant, who is still free to bring forward petitions that the Agency has determined to be challenging from an environmental impact perspective.

A formalized scoping process could ultimately inform and drive alternative permitting tracts before the Board where projects with limited issues that are largely resolved during the scoping phase benefit from a streamlined, administrative review before the Board, and projects with more major issues not resolved during the scoping phase following the more contested, adjudicated path.

2. **Case Manager:** The Agency recommends that the Board assign a case manager to projects at the beginning of the scoping phase. The case manager would oversee the public outreach component and work with the Agency to ensure appropriate natural resource assessments occurred prior the filing of any petition. The case manager would not be bound by the rules prohibiting ex parte communications, so the case manager could answer the procedural questions of all parties, provide technical assistance especially to communities and interveners, and facilitate resolution of issues amongst parties outside the formal proceeding. The case manager would manage a project from scoping, to permitting and through post construction monitoring. You have heard repeatedly from petitioners, interveners and statutory parties that the PSB process is a bit of a 'black box'; a case manager that is isolated from the decision making arm of the Board but integrated enough to provide information and guidance on a specific docket would go a very long way to resolve this shortcoming.
3. **Technical Support for Intervening Towns:** The Commission has heard from New York that developers of large generation projects in that state must pay into a fund that is administered by the siting board to support municipalities and interveners to build the record. In New York, there is a limited pot of money set aside for the scoping phase of projects and a larger amount for the formal proceeding. The Agency supports providing some form of support to municipalities for large projects – 15MW or larger – so that they may engage more meaningfully in energy generation proceedings that affect their community. Municipal intervention is only meaningful if communities have access to experts that can articulate their concerns objectively and in a fashion that will hold weight with the Board. The New York model of administering a fund that is paid out judiciously to affected towns is one approach; however, a preferred approach may be for the Board to identify and retain a suite of experts (legal, natural resource, engineering, etc.) that could be made available to municipalities at the Board's discretion. The petitioner would still fund these individuals, but they would be managed by the Board and assigned to parties to ensure the quality and objectivity of the experts is known and maintained.

The Board's case manager would be the logical person to manage this technical support team and make resource allocation decisions. The Board may also choose to require towns seeking technical support to provide some level of matching funds to help assure the assistance is going to parties truly committed to meaningful engagement in the proceeding.

4. **Concurrent Permit Review:** Many generation projects require not only a CPG, but other permits from the Agency (wetlands, stormwater, 401 certification, etc.). It is critical for the Agency to have technically complete permit applications in order to provide the Board with evidence and recommendations regarding natural resource impacts under Section 248. Therefore, the Agency recommends the Board require that petitioners file their collateral permits before or

simultaneous with their CPG and that the docket schedule aligns with ANR review so that the two processes may proceed concurrently and inform each other. For instance, discovery under Sec. 248 should not begin until ANR determines the collateral permits are technically complete. This concurrent review allows both the Board and the Agency to become aware of and respond to changes in the project at the same time – as they emerge – which will ultimately save time and resources for all parties, and result in fully informed findings for both jurisdictions. The Agency currently encourages petitioners to file permits simultaneous with the CPG and we continually advocate for docket schedules that align the review processes, but it would be to the benefit of all parties if this alignment was formalized, predictable and required by the Board.

- 5. The Board should defer to and Adopt the recommendations of the Agency regarding the Natural Resource impacts of a project:** As the Public Service Board's focus has shifted from primarily rate and reliability decisions to increasingly large scale land use development decisions, the Agency believes the Board when making decisions regarding natural resource impacts should defer to the expertise of the Agency with the statutory obligation and responsibility to protect and manage these resources, the Agency of Natural Resources.

The Board does not have the staff to examine and evaluate the scientific and technical testimony offered by project opponents and proponents. In contrast, the Agency has the statutory obligation to provide the Board with evidence and recommendations on the natural resource impacts of the project. The Board should adopt the recommendations of the Agency. Any party who disagrees with or proposes an alternative recommendation should have the burden of demonstrating by clear and convincing evidence why the Board should not adopt the Agency's recommendation. Concurrent permit review, as outlined above, will enable complete and comprehensive Agency recommendations.

- 6. Composition of the Public Service Board:** In addition to concurrent review of permits and greater deference to Agency recommendations on natural resource impacts, we suggest that for the siting of large generation projects – 15MW and larger – that the Board be expanded to include a representative from the Agency. Natural resource impacts play a critical role in the permitting of these large plants, and while the Agency actively engages as a party to proceedings, having an ANR representative participate directly in the Board's deliberations and final decision making is commensurate with the potential landscape scale impacts of these projects. As the Commission has heard from several other states, it is quite common for the head of a state's environmental agency to sit on the siting board. Direct Agency involvement in siting decisions for landscape scale facilities is even more critical in Vermont than in these other states, because under Sec. 248, jurisdiction over a range of natural resource impacts (wildlife habitat, forest health, etc.) rest with the Board and not with the Agency.

For large scale generation facilities – 15MW or larger – the Agency also recommends including a regional representative in siting decisions. Since large projects may impact several municipalities and since some towns may not have the capacity to provide a select board member to the Board, we suggest that an expert in regional land use from the affected region be added to the Board as an ad hoc member for siting of facilities over 15MW. A Regional Planning Commissioner or Act 250 District Commissioner may be an appropriate candidate. Both are familiar with the natural resource and land use issues that influence siting decisions, and their inclusion will insert a regional perspective to the Board's deliberations and decisions.

7. **Clear Standards:** Strengths of the existing Sec. 248 process are that the review criteria encompass a broad range of impacts and benefits and that the analysis of projects under the criteria evolves as new science and considerations are made known to the Board. The Agency believes the review criteria as currently articulated under Section 248 are adequate and that retaining discretion for the Board to make decisions based on those criteria is appropriate in most cases; however, there are certain potential impacts from generation projects that may benefit from more clear and predictable standards. General standards developed with public input outside of a contested docket could help to address certain issues and impacts that arise frequently before the Board. Clear standards for noise impacts, blasting protocols and decommissioning are areas for which the Board may choose to develop standards. And while the Agency issues our own permits for some natural resource impacts, there are a number of potential impacts to wildlife habitat and forest health that the Board has jurisdiction over through Sec. 248. To the extent the Agency has standards or adopted guidance regarding these impacts, we encourage the Board to defer to these standards.
8. **Funding for Monitoring and Enforcement:** The Agency recommends that any changes to the energy generation siting process include improvements to how pre-construction, construction phase and post-construction compliance monitoring and permit enforcement is funded and implemented. A model that the Board may choose to pursue would require petitioners to pay the costs associated with monitoring, but have the Board hire and oversee third party monitors that conduct the work. The contractual relationships should be between the Board and the monitors, not between the petitioner and the monitors. The Board's case manager could also work with impacted individuals or communities to ensure the choice of monitor is acceptable and that the monitors' findings are transparent and accessible. The Board may also choose to add petitioner-funded investigative and enforcement capacity so that the Board or its representative can follow up on complaints of non-compliance and enforce in a timely fashion. In some cases, instances of non-compliance may be brief, but have lasting impacts so the ability to react quickly to valid complaints is critical.
9. **Filing Fee:** Many permit programs in the Vermont require some form of filing or licensing fee – as do the siting permits from most of the other states we have heard from. The Agency recommends that any changes to the energy siting process include the creation of an application fee that supports not only the work of the Board, but that of the statutory parties required to participate in the given proceeding. The application fee could provide base level support for Board staff and the statutory parties required to participate in the proceedings. The parties would still retain bill back authority to seek reimbursement for extraordinary costs associated with large or complex projects. Since regulated utilities provide ongoing funding for the Board through rates, this fee may only need to apply to petitions for merchant plants.
10. **Cumulative Impact Analysis:** The Board should consider cumulative impacts in its analysis. With goals of the 2011 Comprehensive Energy Plan, the SPEED program, the standard offer, and other incentive based programs, generation facilities of all scales and technologies have proliferated across the state. Absent a cumulative impact analysis, the Board perpetuates a fiction that each project is independent and isolated and should not be considered in relation to what came before and what will come in the future. The cumulative impacts of large energy generation projects on wildlife habitat, forest health, high elevation cold water streams, and landscape connectivity are especially important considerations in siting and permitting. The Agency is interested in working with the Board to consider cumulative impact more adequately under Sec.

248 and is aware of a number of examples of cumulative impact standards to seed the conversation.