

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling for the Location,
Construction and Operation of a 4.8 MW
Wind Renewable Generating Project on
Flagg Hill Road in Colebrook,
Connecticut (“Wind Colebrook South”)**

Petition No. 983

May 20, 2011

**POST-HEARING BRIEF
OF FAIRWINDCT, INC., STELLA AND MICHAEL SOMERS AND SUSAN WAGNER**

Pursuant to the Council’s invitation to the parties and intervenors to submit briefs and findings of fact by May 20, 2011, FairwindCT, Inc., Stella and Michael Somers and Susan Wagner (the “Grouped Parties”) hereby submit this post-hearing brief regarding the petition for declaratory ruling filed by BNE Energy Inc. on December 6, 2011.

In sum, the Grouped Parties submit that application of the law to the facts of this proceeding demonstrates that the petition must be denied based on BNE’s failure to satisfy the requirements of General Statutes § 16-50g et seq., including even the minimal requirement of Section 16-50k(a) that the proposed project comply with the water quality standards of the Connecticut Department of Environmental Protection (“DEP”). Even taking into consideration the numerous revisions to the petition over the course of this proceeding, BNE failed to carry its burden to show that its proposed project complies with DEP water quality standards, applicable noise regulations and other environmental regulations and statutes. These failures are fatal to BNE’s petition, because the development and management phase does not apply to petitions. Therefore, even assuming that the failures and inadequacies of this proposal could be resolved after further site investigation and study and further revisions to the proposed project, there is no

opportunity for such revision. Moreover, the project should be denied because it expressly violates Colebrook's planning and zoning regulations and its plan of conservation and development, will have a substantial adverse effect on historic and cultural resources, including a property on the National Register of Historic Places and a property designated as a National Natural Landmark and wholly fails to comply with even the minimal setback standards established by the turbine manufacturer.

BACKGROUND

I. BNE's Repeated Revisions and Additions Demonstrate the Inadequacy of its Original Petition

BNE submitted its petition on December 6, 2010, seeking a declaratory ruling that no certificate of compatibility and public need is necessary for its proposed construction of a 4.6 MW industrial wind turbine project in residential Colebrook, Connecticut. In support of and as part of its petition, BNE submitted 13 exhibits. Those exhibits included, *inter alia*, site plans, a stormwater management plan, an erosion and sediment control plan, a terrestrial wildlife habitat and wetland impact analysis, a visual resource evaluation, an "interim report" on bat acoustic studies, a "final report" on breeding bird surveys and a noise evaluation. The Council is scheduled to issue its decision on BNE's petition for declaratory ruling by June 4, 2011, in accordance with General Statutes § 4-176(i).

In its petition, BNE seeks approval to site three GE 1.6 MW turbines with a hub height of 100 meters on the property at 17 and 29 Flagg Hill Road in Colebrook. BNE seeks approval for a blade length of 40.3 meters, but has also requested approval for a blade length of up to 50 meters. BNE proposed locations for two of the three turbines in its petition that are within less

than 300 feet from the project site's boundaries. One turbine is just 140 feet from a residential property that is south of the project site.

On February 24, 2011, more than two months after filing its petition, BNE submitted a shadow flicker report attached to interrogatory responses, thereby apparently revising its visual resources evaluation submitted as Exhibit J to the petition. (BNE's Amended Responses to Council's Interrogatories, Set One, Answer 17 & Ex. 3.) That report assumed that BNE was seeking approval for 100-meter blades. (BNE's Amended Responses to Council's Interrogatories, Set One, Ex. 3, page 1.)

On March 15, 2011, more than three months after filing its petition, and more than halfway into the 180-day statutory time limit imposed by Section 4-176(i), BNE again revised Exhibit J by submitting a "Supplemental Visual Resource Evaluation Report" that, for the first time, provided information about the potential visual impact of the 82.5-meter diameter blades. (Libertine Pre-Filed Testimony, pages 1-2 & Ex. 2.) The visual resource evaluation report attached to the petition as Exhibit J analyzed the potential visibility of the 100-meter blades. (Petition, Ex. J, page 3.) On that same date, BNE provided a supplemental shadow flicker report analyzing flicker likely to result from the 82.5-meter diameter blades. (Libertine Pre-Filed Testimony, page 5 & Ex. 3, page 1.)

On March 15, 2011, again more than halfway into the 180-day statutory time limit imposed by Section 4-176(i), BNE submitted an entirely new set of site plans attached to the pre-filed testimony of Melvin Cline. (Cline Pre-Filed Testimony, Ex. 1.) Those site plans were dated March 14, 2011 and appeared to replace Exhibit F to BNE's petition. BNE also filed new stormwater management and erosion and sediment control plans, which appeared to replace

Exhibits G and H to its petition. The “revised” site plans included purported elimination of 1:1 slopes, significant changes and additions to engineering features such as sedimentation facilities and significant changes to the proposed road. Although Mr. Cline’s sworn testimony indicates that these plans are revisions to the original petition, Carrie Larson, attorney for BNE, stated during the proceeding that the first set of plans was never withdrawn. (4/14/11 Tr. 167:18-24.)

Also on March 15, 2011, BNE submitted two ice throw reports, one for each proposed blade length, thereby apparently revising its petition again more than halfway into the 180-day statutory time limit imposed by Section 4-176(i). (Heraud Pre-Filed Testimony, Exs. 2 & 3.)

Also on March 15, 2011, BNE submitted its “final” bat acoustic report attached to the pre-filed testimony of David Tidhar. That report presumably was intended to replace the “interim” report submitted by BNE as Exhibit K to its petition. (See Tidhar Pre-Filed Testimony, page 2 (“Due to the fact that West was continuing to collect data concerning bat activity on the property, Exhibit L [sic] to the petition is a preliminary report. Our final bat acoustic report is attached hereto as Exhibit 2.”).)

On March 15, 2011, BNE revealed, in response to interrogatories, plans to perform a spring migratory bird study on the site and additional acoustic bat monitoring on the site from May to October 2011. The results of these surveys will not be available until well after the Council renders its decision on this petition. BNE also revealed, for the first time, that it had hired Dr. Michael Klemens to perform on-site surveys for vernal pools, amphibians and reptiles in March and April 2011.

On April 20, 2011, BNE submitted an on-site, in-season herpetological assessment of the site. All parties were required to cross examine Dr. Klemens, who authored the report, the next day, because Dr. Klemens was not available to attend the last day of the evidentiary hearing. (Klemens Herpetological Assessment, page 1; 4/21/11 Tr. 10:9-18, 205:18-20; 4/26/11 Tr. 100:15-23.) Dr. Klemens discovered the presence of four cryptic vernal pools, including two high-value pools. BNE had stated that no vernal pools existed on the site. Dr. Klemens determined that the site contains habitat for three state-listed species. BNE had stated that no state-listed species were likely to be present on the site. (Klemens Herpetological Assessment, pages 1-4; Petition, Ex. I, pages 4, 11, 13, 21 & Attachment D; 4/21/11 Tr. 216:25-219:3.)

II. BNE's Repeated Revisions and Additions to the Petition Prejudiced the Council and the Parties and Intervenors

In short, the petition filed by BNE in early December 2010 has been significantly revised in the past several months, during the pendency of the evidentiary hearings. Statements made in the text of BNE's petition are no longer accurate. Exhibits F, G, H and K have been replaced entirely by new plans and studies. Exhibits I, J and L have been significantly revised. Additional studies were conducted during and apparently will continue to be conducted well after the scheduled close of this evidentiary hearing.

The combined effect of these revisions was to severely prejudice not only the parties and intervenors opposed to this petition, but also the Council, which is faced with approving or denying a petition that has changed substantially since its original iteration. These constant changes culminated in BNE's filing an entirely new site plan, stormwater management plan and sediment and erosion control plan and producing a brand-new on-site survey with significant environmental findings the afternoon before the last opportunity to examine the author of that

survey. BNE also revealed, again just days before the evidentiary hearing concluded, that it plans to conduct additional bat and bird studies that will not be concluded until after the Council renders its decision on this petition.

ARGUMENT

I. BNE Has Not Met Its Burden

BNE has argued, since the filing of its petition, that it need only show that its proposed project complies with DEP air and water quality standards to secure approval of its petition for declaratory ruling. (Petition, pages 1, 34-35.) This argument is based on the language of Section 16-50k(a) of the General Statutes, which provides:

Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling . . . the construction or location of any fuel cell, unless the council finds a substantial adverse environmental effect, or of any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Environmental Protection . . .

BNE argues that the language of this provision commands the Council to approve its petition if it complies with DEP air and water quality standards, regardless of whether the project has other substantial adverse environmental effects, and regardless of whether the project complies with other state and federal laws and regulations.

The simple truth is that this statutory language does not, and cannot, pre-empt all other applicable law, including state and federal environmental statutes – and it explicitly cannot pre-empt any statutes not contained within the Public Utility Environmental Standards Act or Title 16a. The Council has recognized that fact in its consideration of other petitions for declaratory rulings. For example, in the Council's recent decision to approve a petition for

declaratory ruling regarding the retrofit and operation of a biomass-fueled generation unit in Montville, the Council ruled that the project would not have a substantial adverse effect. See Petition No. 907, Letter from D. Caruso to A. Lord, dated Feb. 26, 2010. The Council's decision on that petition relied on its finding that

the effects associated with the construction, operation and maintenance of an . . . electric generating facility at the proposed site, including effects on natural environment; public health and safety; scenic, historic and recreational values are not in conflict with the policies of the State concerning such effects, and are not sufficient reason to deny the proposed project.

Petition No. 907, Declaratory Ruling, page 2. Identical language has appeared in numerous other declaratory rulings issued by the Council. See, e.g., Petition No. 834, Opinion, page 4 (Apr 24, 2008); Petition No. 831, Opinion, page 2 (Apr. 10, 2008); Petition No. 784, Opinion, page 4 (June 7, 2007); Petition No. 737, Opinion, page 2 (Sept. 14, 2006).

BNE therefore has not only the burden of showing that its proposed project meets DEP air and water quality standards, but also the burden of showing that its proposal will not have a substantial adverse environmental effect and will comply with other applicable statutes and regulations, as is evident by its failure to conduct adequate on-site, in-season studies for birds and bats and its failure to conduct any on-site surveys for vernal pools, other mammals, amphibians and reptiles. (Petition, Ex. I; Klein Pre-Filed Testimony, page 3.) In the absence of such adequate baseline surveys, the Council cannot determine the nature of the adverse environmental effect of BNE's proposed project.

The Grouped Parties are each intervenors under the Connecticut Environmental Protection Act ("CEPA"). Upon the filing of CEPA interventions, the Council must, in addition to considering the statutory and regulatory otherwise applicable to BNE's petition, also consider

whether BNE's proposed project "has, or . . . is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." Conn. Gen. Stat. § 22a-19(a). The project must then be denied if there is a feasible and prudent alternative "consistent with the reasonable requirements of the public health, safety and welfare." Gardiner v. Conservation Comm'n of Waterford, 222 Conn. 98, 109 (1992); Conn. Gen. Stat. § 22a-19(b); see also Mystic Marineline Aquarium Inc. v. Gill, Conn. 483, 499 (1978). As is discussed in more detail below, BNE's project will have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water and other natural resources of the state, including trees and wildlife. See Paige v. Fairfield Plan & Zoning Comm'n, 235 Conn. 448, 462-63 (1995) (trees and wildlife are natural resources for purposes of CEPA). BNE has not met its burden of showing that there are no feasible and prudent alternatives to the project; therefore, the Council must deny its petition.

II. BNE's Petition, Even with Substantial Revision, Fails to Comply with DEP Water Quality Standards

As discussed above, BNE submitted its petition under the authority of Section 16-50k(a), and therefore claims that it need only demonstrate compliance with DEP air and water quality standards. Contrary to BNE's position, even petitions for declaratory ruling submitted pursuant to Section 16-50k are subject to the analysis set forth in Section 16-50g, which requires balancing the need for public utility services with the need to protect the environment and ecology of the state and minimize damage to scenic, historic and recreational values. However, even if the Council were to find that BNE must only comply with DEP air and water quality standards to get approval of this petition, BNE has failed to carry its burden, despite substantially revising its original plans.

The water quality standards of the DEP include, among other things, the requirements set forth in the 2002 Connecticut Guidelines for Soil Erosion and Sediment Control and the 2004 Connecticut Stormwater Quality Manual. (See 2002 Guidelines, page 1-4; 2004 Manual, page 1-2.) Neither set of BNE's plans complies with the requirements of the water quality standards presented in those DEP manuals.¹ Nor do they satisfy the requirements of the General Permit.

The failures of the site plans and related stormwater management and erosion control plans are discussed in detail in the pre-filed testimony and supplemental testimony of William Carboni, a professional engineer licensed in Connecticut who reviewed the plans at the request of the Grouped Parties. (See Mr. Carboni's testimony, dated Mar. 15, 2011 and Apr. 19, 2011.) Mr. Carboni detailed BNE's use of slopes steeper than 2:1, in violation of good engineering practices and in the absence of the geotechnical testing that shows steeper slopes are possible on the site. Mr. Carboni detailed BNE's repeated failure to provide an adequately sized area for the blade laydown and assembly areas. Mr. Carboni detailed the failure of BNE to provide adequately sized and appropriately located sediment basins and traps and outlet protection – his most significant findings, because all of those features are required to prevent deposits of

¹ BNE has raised the argument that the 2002 Guidelines and 2004 Manual are not requirements, but are merely guidance documents. BNE is correct that both the 2002 Guidelines and the 2004 Manual are guidance documents. (See, e.g., 2002 Guidelines, page 1-1.) However, in practice, these documents provide the minimum requirements for site engineering; moreover, there is no reason that guidance documents cannot be standards. There are numerous different programs in the State regulating stormwater management. Compliance with the 2002 Guidelines and 2004 Manual ensures compliance with all the applicable laws and requirements, including the Soil and Erosion Control Act and the General Permit. (See 2002 Guidelines, page 1-4; 2004 Manual, pages 1-6–1-7.)

sedimentation into the wetlands and watercourses on the site and prevent pollution to the waters of the State.

During the evidentiary hearing, Melvin Cline, BNE's engineer responsible for the site plans and related stormwater management and erosion control plans, testified that the second set of plans, submitted on March 15, 2011, most closely comply with water quality standards and are most protective of the waters of the State. (4/14/11 Tr. 169:1-8 (Cline).) Even those plans, however, are not final, lack necessary engineering features and are based on assumptions that have not yet been confirmed by geotechnical and other on-site investigation.

For example, the revised plans provide for two bioretention ponds or basins. (Cline Pre-Filed Testimony, Sheets C-310–C-314.) The use of such ponds to treat stormwater is contemplated in the 2004 Connecticut Stormwater Quality Manual, but site investigation must be conducted to determine if such ponds are feasible on a particular site. Groundwater depths, including season-high depths, must be determined, appropriate soil types must be present in the area of the pond, embankments may need to be constructed and ponds should be located at least 750 feet away from vernal pools and should not be sited between vernal pools or in areas that are known primary amphibian overland migration routes. (2004 Manual, Chapter 11-P1-4 & -5.) BNE has not done any geotechnical analysis of the site, nor has it collected infiltration data or determined the depth of the season-high groundwater on the site, so the ponds are not designed yet. (4/14/11 Tr. 158:4-19 (Cline).) The 2004 Manual warns that stormwater ponds like those proposed by BNE “can serve as decoy wetlands, intercepting breeding amphibians moving toward vernal pools,” thus resulting in the destruction of amphibian eggs deposited in stormwater ponds. (2004 Manual, Chapter 11-P1-4.) BNE proposes to place two bioretention ponds less than

500 feet from both of the Tier One cryptic vernal pools on the site. The bioretention pond proposed to be adjacent to Turbine 3 is less than 375 feet from the larger Tier One cryptic vernal pool identified by Dr. Klemens. (See Klemens Herpetological Assessment, page 6 (figure); Cline Pre-Filed Testimony, Ex. 1, Sheet C-310.) Mr. Carboni testified that the bioretention ponds were not properly graded in conformance with the 2004 Manual, and that once the grading errors are corrected, several of the ponds will not actually fit on the site. (Carboni Supp. Pre-Filed Testimony, pages 9-10.) BNE's proposed stormwater ponds therefore are not only not final, but will violate the 2004 Manual requirements and fail to protect not only the waters of the State, but also the amphibians that are breeding on site and adjacent to the site.

Despite Mr. Cline's claim that the revised plans eliminated the use of 2:1 slopes in the absence of engineered design features, Mr. Carboni testified that the revised plans do, in fact, contain slopes steeper than 2:1. (Carboni Supp. Pre-Filed Testimony, pages 2-3.) The 2002 Guidelines require that where slopes steeper than 3:1 have a vertical height of more than 15 feet, reverse slope or cross slope benches be incorporated into the design. (2002 Guidelines, Chapter 5-2-5.) In the alternative, engineered structural design features may be incorporated to stabilize the slopes, but such alternatives cannot be designed until detailed soil mechanics analyses are completed. (Id.) The revised plans do not contain reverse slope benches, and BNE has not conducted geotechnical analysis on site that would permit an engineer to design alternative structural features. (See 4/14/11 Tr. 149:4-51 4/16/11 Tr. 179:17-25 (Cline).)

The revised plans contain grading errors. Mr. Carboni testified that when the grading errors are corrected, the grading will extend in some areas beyond the boundaries of the project site. Two example analyses by Mr. Carboni shows that the corrected grading at two locations and

related outlet protection facilities on the lower access road will extend beyond the boundary of the driveway and utility easement over BNE's property in favor of the property owner at 29A Flagg Hill Road. (Carboni Supp. Pre-Filed Testimony, pages 2-4.) Mr. Cline agreed that grading revisions may be required. (Cline Supp. Pre-Filed Testimony; 4/16/11 Tr. 181:2-7.)

In sum, BNE's own engineer conceded that the site plans submitted with the petition were not complete and contained errors, and, despite having since been significantly revised, remain incomplete and still contain errors. Mr. Cline testified that the revised plans "are still incomplete. There is still work to be done with calculations for the basin -- retention basins. There's additional work that will be done on slope stability with geo-technical information and there's some additional work to be done at the wetlands crossing where we have geo-tech work information." (4/14/11 Tr. 149:21-150:3 (Cline).) In fact, in Mr. Cline's rebuttal testimony, he agrees that many of the omissions and errors noted by Mr. Carboni and by Michael Klein, another witness for the Grouped Parties, need to be added or revised before the project can be built. (Cline Supp. Pre-Filed Testimony, pages 5-13; 4/16/11 Tr. 180:10-182:7.)

The language of Section 16-50k(a) is clear. In order to obtain a declaratory ruling, BNE must, at a minimum, show that its proposed project complies with DEP air and water quality standards. It must make that showing at the time its petition is filed – not through subsequent revision, and not after approval is secured. Mr. Cline testified repeatedly that "additional work," including final design assumptions, site topography, geotechnical analysis and determination of groundwater levels will be done later, after approval of the petition by the Council. (4/14/11 Tr. 149:21-150:3 (Cline); Cline Supp. Pre-Filed Testimony, page 13.) BNE's repeated claims that, if

approved, its project will eventually meet those standards is on its face ground to deny this petition.

III. BNE's Proposed Project Does Not Comply with Connecticut's Noise Regulations

The noise statutes and regulations of this state are not contained within the PUESA or Title 16a of the General Statutes. Therefore, even under BNE's interpretation of Section 16-50k(a), its proposed project is not exempt from noise-compliance regulations.

A. Noise Levels Must Comply at Property Lines

Since July 1, 1974, Connecticut has had a strong public policy with respect to noise. That public policy is reflected in Section 22a-67 of the General Statutes:

(a) The legislature finds and declares that: (1) Excessive noise is a serious hazard to the health, welfare and quality of life of the citizens of the state of Connecticut; (2) exposure to certain levels of noise can result in physiological, psychological and economic damage; (3) a substantial body of science and technology exists by which excessive noise may be substantially abated; (4) the primary responsibility for control of noise rests with the state and the political subdivisions thereof; (5) each person has a right to an environment free from noise that may jeopardize his health, safety or welfare.

(b) The policy of the state is to promote an environment free from noise that jeopardizes the health and welfare of the citizens of the state of Connecticut. To that end, the purpose of this chapter is to establish a means for effective coordination of research and activities in noise control, to authorize the establishment of state noise emission standards and the enforcement of such standards, and to provide information to the public respecting noise pollution.

(Emphases added.) In addition, the legislature commanded in Section 22a-72(a) that “[s]tate agencies shall, to the fullest extent consistent with their authorities under the state law administered by them, carry out the programs within their control in such a manner as to further the policy stated in section 22a-67.”

The legislature, in Section 22a-69, instructed the Commissioner of Environmental Protection to “develop, adopt, maintain and enforce a comprehensive state-wide program of noise regulation” that was to include controls on environmental noise through the regulation or restriction on the use and operation of stationary noise sources, and the establishment of, in “ambient noise standards for stationary noise sources which in the commissioner’s judgment are major sources of noise when measured from beyond the property line of such source . . .” Conn. Gen. Stat. § 22a-69(a)(2). The DEP adopted such regulations, effective June 15, 1978. See R.C.S.A. § 22a-69-1 et seq.

The DEP regulation has an unambiguous requirement for noise regulation compliance to take place at the property line. RCSA §22a-69-3.1 provides: “General Prohibition. No person shall cause or allow the omission of excessive noise beyond the boundary of his/her Noise Zone so as to violate any provisions of these Regulations.” The definition of Noise Zone is provided in RCSA §22a-69-1.1: “(o) noise zone means an individual unit of land or a group of contiguous parcels under the same ownership as indicated by public land records and, as relates to noise emitters, includes contiguous publicly dedicated street and highway rights-of-way, railroad rights-of-way and waters of the State.”

Since the adoption of the statute and regulations, the Siting Council, when considering noise associated with projects before it for consideration, has consistently applied the noise regulations to have a point of compliance at the property line, rather than at the nearest residence or bedroom, as advocated by Mr. Thomas Wholley, the noise witness presented by BNE. See, e.g., Petition No. 907, Findings of Fact, ¶¶ 76-77 (Feb. 25, 2010) (noise levels from proposed biomass plant range from 47 to 51 dBA “at residential property boundaries” and therefore will

comply with noise regulations); Petition No. 834, Opinion, page 3 (Apr. 24, 2008) (“Noise levels during plant operation are expected to be 62 dBA, which is below the Class B land use noise limit of 66 dBA at a residential property boundary”); Petition No. 831, Opinion, page 2 (Apr. 10, 2008) (“The plant would be designed to meet State of Connecticut and City of Waterbury noise regulations, especially the provision that noise levels during plant operations would not exceed 61 dBA during the day and 51 dBA during the night at the nearest residential property boundary.”); Petition No. 784, Opinion, page 3 (June 7, 2007) (“The Council is satisfied that noise levels during plant operations would not exceed a 61 dBA noise level during the day and 51 dBA during the night at the nearest residential property boundary, as required by State noise regulations.”); Petition No. 451, Findings of Fact, ¶ 60 (June 20, 2000) (noting that “the calculated future ambient noise level would increase by as much as 5 dBA at the nearest residential properties”) (all emphases added).

In considering a petition regarding a proposed biomass plant, the Council found that noise levels from the proposed plant operations “at the nearest residential buildings are expected to range from 37 to 50 dBA but may exceed 51 dBA at the property line.” Petition No. 784, Findings of Fact, ¶ 110 (June 7, 2007). The Council further found that “[n]oise mitigation for the exterior fans may be necessary to keep the noise level below 51 dBA at the property line.” *Id.* ¶ 111 (emphasis added).

The judges who have looked at the noise regulations have also applied the regulations at the property line, rather than at the residence. See Russell v. Thierry, Superior Court, No. CV010385198S, 2001 WL 1734441, at *2-3 (Dec. 11, 2001, Rush, J.) (finding the property line to be the point of compliance); JZ, Inc. v. Planning & Zoning Comm’n of East Hartford,

Superior Court, judicial district of Hartford, No. CV 08-4034369, 2008 WL 4378733, at *4 (Sept. 9, 2008, Rittenband, J.) (rev'd on other grounds) (referencing noise levels at the residential property line).

Measurement of noise levels has never been to the bedroom of the nearest residence. BNE can point no controlling legal authority for the proposition that measurement is to the bedroom rather than to the nearest property line. Like other environmental points of compliance, the point of compliance is the property line. BNE's novel argument has not been accepted by any authority.

The Town of Colebrook has not adopted an ordinance providing for the reduction or elimination of excessive noise and the administration thereof. The Colebrook rules are the DEP noise regulations by default. See Conn. Gen. Stat. § 22a-69(b)(2). Measurement of noise levels under the Connecticut noise regulations are explicitly to the property line, not the receptor's bedroom. See RCSA § 22a-69-3.1. Regulation § 22a-69-4 provides: "(g) Measurements taken to determine compliance with Section 3 shall be taken at about one foot beyond the boundary of the Emitter Noise Zone within the receptor's Noise Zone." This is definitely not where people sleep. This is definitely not a measurement taken into bedroom. This is one foot beyond the property boundary. BNE's noise measurements violate the regulations.

BNE's argument of industrial versus residential should be resolved by expressly defining emitters and receptors by their existing zoning classifications. This proposed project site is designated a "Residential Zone" under the Town's zoning ordinance and zoning map, and pursuant to the Town's zoning regulations, only limited residential uses are permitted as of right.

(See Bulk Filing, Town of Colebrook Zoning Regulations, revised May 28, 2008, and Colebrook Zoning Map.) The correct criteria for measurement is therefore residential to residential.

Any argument that the existence of meteorological tower on a piece of property that remains zoned residential has been converted to industrial use and is now for zoning and noise purposes a de facto industrial use would be misplaced. Colebrook's Zoning Regulation knows no such rule. The Council has no authority to overrule this ordinance. Under the Town zoning regulation, the site may only be treated as industrial if its zoning status is changed. BNE has sought no such zoning change.

In any event, the argument is academic. Based on the residence-to-residence limit there is in excess above the regulatory requirement of 6-10 dB, and the turbines exceed the industrial-to-residence limit as argued by BNE by 2-3 dB. (Bahtiarian Supp. Pre-filed Testimony, dated Apr. 4, 2011, page 3 and Ex. 6.) Under either analysis, the BNE wind turbines violate the Noise Regulations and cannot be constructed on the proposed site.

B. BNE's Noise Study Is Incomplete and Inaccurate

Michael Bahtiarian, INCE Bd. Cert., reviewed the report prepared by Mr. Wholley for BNE. Mr. Bahtiarian reached five specific conclusions regarding details presented in BNE's report. Specifically, he found:

- The report claimed that all portions of the noise regulations would be met; however, the study did not address nor assess impulsive noise;
- The report incorrectly selected the DEP A-weighted sound pressure level noise limit and used the Class C Industrial Zone rather than the Class A Residential Zone as the zone for the noise source;

- The methods used to predict sound levels were not done on a worst-case basis. The studies were done using 1000 Hz octave band rather than the 500 Hz octave band, and a worst-case analysis should have used a temperature of 50°F (rather than 68°F) at 70% relative humidity. When using the proper temperature, the value for atmospheric absorption would be 1.9 dB/km rather than 2.8 dB/km. If 1.9 dB/km were used, the predicted sound pressure level would be 1 to 5 dB higher. If no atmospheric absorption were taken into account, the predicted SPL would be 2 to 8 dB higher. The report as originally drafted used maximum wind speeds of 9 m/second as maximum daytime wind speed and 8 m/second as the maximum wind speed for nighttime sound levels;
- BNE's study of existing conditions was diminutive for a project of this scale. Background conditions were measured from 5 to 15 minutes at various locations. Fifteen minutes is far too short a sampling time to accurately characterize the background sound level conditions; and
- Based on Mr. Bahtiarian's own computations of expected noise levels, under worst-case assumptions, sound levels will exceed the State of Connecticut noise regulations based on a comparison of residential-to-residential nighttime noise limits and industrial-to-residential nighttime noise limits.

(Bahtiarian Pre-Filed Testimony, 3/15/2011 pages 4-12.) Sound levels as calculated by Mr. Bahtiarian show that there will be 6 to 10 dB excess to DEP residential-to-residential limits at night and 0 to 4 dB excess to DEP industrial- to-residential limits at various property line locations. (Bahtiarian Supp. Pre-Filed Testimony, 4/4/2011, page 3 & Ex. 6.)

In the past, the Council has approved projects that would violate the sound regulations where effective mitigation measures could be undertaken by the applicant or petitioner. For example, in Petition No. 451, the Council found that post construction noise that exceeded the Connecticut noise standards could be mitigated by the addition of acoustical enclosures silencers. (Petition No. 451, Findings of Fact, ¶ 62 (June 20, 2000).) There, the petitioner, PPL Wallingford, would undertake post construction noise monitoring to confirm compliance with the Connecticut noise standards. If proper setbacks are not included in the project, the only effective measure for mitigating turbine noise to comply with the law is by turning off the turbines. (Bahtiarian Pre-Filed Testimony, Mar15, 2011, page 12.)

Mr. Bahtiarian undertook his own background noise monitoring program in Colebrook. He installed equipment on the afternoon of Friday, March 25, 2011, and had the equipment removed on the afternoon of Monday, April 4, 2011. One device was located at the end of Flagg Hill Road in the vicinity of VHB's monitoring location M1. (Bahtiarian Second Supp. Pre-Filed Testimony, dated Apr. 14, 2011, pages 1-2.)

The results showed at location M1, the average background noise level was 30 dB(A), not 37 dB(A) as reported by BNE. The background noise level dropped to as low as 22 dB(A) for three of the seven nights and 28 dB(A) for the four remaining nights. (Bahtiarian Second Supp. Pre-Filed Testimony, dated Apr. 14, 2011, page 2.)

Mr. Bahtiarian concluded that Colebrook location M1 is extremely quiet, much quieter than indicated by the brief sampling done by the BNE. (Bahtiarian Second Supp. Pre-Filed Testimony, dated Apr. 14, 2011, page 3.) The significance of these measurements is that the proposed wind turbine operation will raise noise levels approximately 20 dB higher than current

background. A 10 dB increase is perceived as a doubling of loudness, and a 20 dB increase will be a quadrupling in loudness. This is extreme. (Bahtiarian Second Supp. Pre-Filed Testimony, dated Apr. 14, 2011, page 2.)

Dr. Bronzaft testified concerning the psychological effects of noise on people. (Bronzaft Pre-Filed Testimony; 4/21/2011 Tr. 151:18-160:13 (Bronzaft).) Dr. Bronzaft has a PhD and MA from Columbia University, has been a consultant on noise abatement to the New York City Transit Authority and has written chapters in eight books mostly on noise and its effects on people. She has been an invited speaker at several conferences. (Bronzaft Pre-Filed Testimony, Ex.1.) Based upon her review of the noise reports in this matter, her review of the literature linking noise to adverse mental and physical health and well-being and her many years of experience in the noise field, Dr. Bronzaft testified that residents in the area of the proposed wind turbine project may very well suffer ill effects from the noise generated by the turbines, including physiological health impacts, stress and a diminished quality of life. (Bronzaft Pre-Filed Testimony, page 3.)

In addition to documented physiological health impacts, noise may dramatically affect an individual's quality of life. Individuals living near a constant noise source may not yet have measurable physiological symptoms, but their quality of life may be substantially diminished. (Bronzaft Pre-Filed Testimony, page 7.) In a study by Dr. Bronzaft on the effects of noise on people living in a flight pattern community, those identified as being bothered by the noise reported having difficulty sleeping. While night flights are of special concern in the area of sleep deprivation, the young, the old and the infirm often tend to sleep during the day, and thus day flights may prove intrusive to these individuals. Sleep difficulties as experienced by the subjects

in a study done by Dr. Bronzaft show that these individuals may suffer long-term health consequences. (Bronzaft Pre-Filed Testimony, pages 7-8.)

The only witnesses with real experience with living near industrial-sized wind turbines were the fact witnesses who testified in the Wind Prospect Docket, Petition No. 980. Several fact witnesses who live near 1.5 MW or 1.65 MW wind turbines testified as to the noise created by the wind turbines that results in sleep disturbance and headaches and other health effects suffered by each of those witnesses. This testimony was administratively noticed in this record. (See Andersen Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 50; A. Cool Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 53; M. Cool Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 54; Ford Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 55; Hobart Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 56; Hobart Amended and Supplemental Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 57; Lindgren Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 58; Meyer Pre-Filed Testimony, FairwindCT Admin. Notice Item No. 59.)

These witnesses live as close as 1320 feet to 1.65 MW industrial wind turbines. One witness who complains of noise in Falmouth, Massachusetts, lives 2745, 3485 and 4065 feet from three different wind turbines. Mr. Meyer of Brownsville, Wisconsin, lives close to five different industrial wind turbines; the closest is 1560 feet, and the farthest is 3300 feet from his house. (See FairwindCT's Findings of Facts for detailed citations). Mr. Meyer presented his diary of wind turbine noise as an attachment to his pre-filed testimony. His almost daily record of disturbing noises is instructive; his account of the effect on his wife, his son and himself is moving. (See the Noise Section of FairwindCT's Findings of Facts.)

The testimony of these witnesses demonstrates that wind turbine noise affects residents living within at least 3300 feet of turbines.

Mark A. Franson, PE, provided testimony in which he measured distances to all six of the proposed wind turbines originally proposed in Petition Nos. 983 and 984. Mr. Franson identified a total of 174 structures within 1.25 miles of any the six proposed wind turbines. (Franson Supp. Pre-Filed Testimony, page 3.)

Charter Oak Exhibit 6, attached to Franson's Supplemental Pre-Filed Testimony, includes a table of distances from BNE's proposed turbines to various houses and other structures found in Colebrook and Norfolk, Connecticut. Properties on Flagg Hill Road range from as close as 1010 feet to the nearest wind turbine and as far as way as 1698 feet. These distances are comparable to the distances testified to by the fact witnesses from Falmouth, MA, Vinalhaven, ME, and Brownsville, WI, who have had to live with industrial wind turbine noise for more than two years.

Only one conclusion can be drawn after reviewing the testimony of Mr. Bahtiarian, Dr. Bronzaft, Mr. Franson and the people who have lived next to industrial wind turbines: Wind turbines do not belong in residential neighborhoods. Connecticut should learn from this experience. The siting of industrial wind turbines should not be permitted in residential neighborhoods.

In keeping with the command of General Statutes § 22a-72, the Council, to the fullest extent consistent with its authority under the state law administered by them, must carry out the programs within its control in such a manner as to further the policy stated in section 22a-67. As BNE has failed to show compliance with Section 22a-69 of the General Statutes and Mr.

Bahtiarian has shown non-compliance with the regulations promulgated thereunder, the Council must deny BNE's petition.

IV. BNE's Proposed Project Will Adversely Impact the Environment

"[T]he policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment . . ." Conn. Gen. Stat. § 22a-1. Under both the Public Utility Environmental Standards Act and CEPA, BNE carries burdens to minimize the environmental impact of its proposed project. Under the PUESA, BNE must show that its project will not have "substantial adverse effects." Under CEPA, BNE must show that there are no feasible and prudent alternatives to its project. BNE has not and cannot meet either burden.

As discussed above, the proposed project will unreasonably pollute the waters of the State, which means the project will have a substantial adverse effect and will unreasonably pollute the public trust in the water. The Grouped Parties' proposed findings of fact detail other ways in which BNE's project will have substantial adverse effects and will unreasonably pollute, impair and destroy the public trust in other natural resources of the state, including in particular wildlife. Some of those findings are highlighted below.

BNE concedes that there will be significant temporary and permanent direct wetland impacts and disturbance of areas in close proximity to wetland resources on the site. (Petition, page 30.) BNE's proposed activities include construction of a wetlands crossing across Wetland 1, which is the most valuable wetland on the site in terms of habitat and wildlife diversity. BNE proposes to access Turbine 3, which is the northwestern turbine, via this wetlands crossing. BNE has not made a showing that this crossing is required or that there are no feasible and prudent alternatives to it. Wetland 1 is not just a wetland; it contains two high-value cryptic

vernal pools that are less than 400 feet downstream from the proposed wetland crossing. The proposed crossing is within the zone that BNE's expert, Dr. Klemens, called "critical upland habitat" for the vernal pools. (4/21/2011 Tr. 212:16-213:7.) In the case of a wetland that supports a cryptic vernal pool, a higher standard must be applied.

Wetland 1 also contains suitable habitat for the spring salamander, a state-listed species. To ensure preservation of this spring salamander habitat, the crossing should not be permitted. The Grouped Parties' witnesses testified that BNE's proposed activity, including its proposed wetland crossing, will have the effect of unreasonably impairing the public trust in the air, water or other natural resources of the state. (Klein Pre-Filed Testimony, pages 2, 7-10, 16; Klein Supp. Pre-Filed Testimony, pages 2-10; Carboni Pre-Filed Testimony, page 23; Carboni Supp. Pre-Filed Testimony, page 13.) BNE has made no showing that any alternatives to the wetland crossing have been considered. None have been presented to the Council.

BNE's proposed activities as a whole will have additional substantial adverse effects on the site and will unreasonably pollute, impair and destroy the public trust. BNE plans to clear acres of trees, many of which grow in the wetlands on the site. Mr. Carboni testified on behalf of the Grouped Parties that BNE's inadequate erosion control measures are likely to result in erosion and deposits of sediment into wetlands, having an adverse effect on wetlands not contemplated by BNE and not included in BNE's deliberately modest estimates of wetlands disturbance. The same witness also testified that the modifications necessary to resolve BNE's plans failures to meet 2002 Connecticut Guidelines for Soil Erosion and Sediment Control would result in a greater direct impact to wetlands than shown in the plans. (Carboni Pre-Filed Testimony, pages 6, 7, 17 and 23.)

Filling and destroying wetlands is contrary to CEPA's mission to conserve the state's environment. Furthermore, the same is likely to be determined to violate the federal wetlands regulations, the Clean Water Act. After the close of the evidentiary hearing in this matter, the U.S. Department of the Army Corps of Engineers informed BNE that a Department of the Army permit is required for the proposed project. (FairwindCT, Inc.'s Late-Filed Request for Administrative Notice, dated May 16, 2011 (pending).)

In addition, BNE's proposed activities are likely to have a substantial adverse effect on other wildlife in the area surrounding Wind Colebrook South, including birds, bats, amphibians, reptiles and other terrestrial wildlife. BNE failed to conduct adequate on-site, in-season studies for birds and bats and failed to conduct any on-site surveys other mammals. (Petition, Ex. I; Klein Pre-Filed Testimony, page 3.) BNE has the burden of showing that its proposal will not have a substantial adverse environmental effect and will comply with other applicable statutes and regulations. Conn. Gen. Stat. § 16-50k(a). The significant wetland impact proposed by BNE will have a substantial adverse environmental impact, and the inadequacy of BNE's wildlife studies does not demonstrate that its proposed project will not adversely affect other natural resources of the State.

In sum, the Grouped Parties presented evidence sufficient to satisfy the requirements of General Statutes § 22a-19(a) and demonstrate that Wind Colebrook South will unreasonably pollute, impair or destroy the public trust in natural resources of the State. The Council must therefore consider feasible and prudent alternatives, pursuant to General Statutes § 22a-19(b). BNE has made no showing that there are no feasible and prudent alternatives to using the wetlands crossing – in fact, BNE has made no showing that there are no alternatives to putting its

proposed project on this site, given the significant value of the habitat found on the site and its location in an area dominated by residences and conservation land. CEPA requires the consideration of alternatives once the prima facie case of unreasonable pollution has been shown. Quarry Knoll II Corp. v. Planning & Zoning Comm'n, 256 Conn. 674, 736 n.33 (2001). Quarry Knoll II and a host of other cases place that obligation on the developer. BNE has not satisfied its obligations, and the Council must deny its petition.

V. BNE Cannot Remedy the Defects in its Petition in a Development and Management Plan/Phase

As noted above, BNE's witnesses repeatedly referred to future additional work to be completed that might eventually result in bringing BNE's proposed project into compliance with, among other things, DEP water quality standards. BNE's witnesses, BNE's counsel, and even members of the Council and its staff have made repeated reference to the development and management plan/phase that this project will purportedly go through if it is approved by the Council. (See, e.g., 4/14/11 Tr. 165:3-166:3 (Cline), 168:6-24 (M. Bachman); 4/26/11 Tr. 116:16-117:2 (Corey), 177:15-23 (Cline), 178:9-179:5 (Cline).)

First, again, Section 16-50k(a) does not state that the Council may grant a petition for declaratory ruling if it does not already comply with DEP water quality standards. Second, and perhaps more significant, the development and management plan/phase that the Council is so accustomed to following as part of its "typical procedure" does not apply to petition proceedings.

As the Council is well aware, the "typical" proceedings it hears are applications for certificates of environmental compatibility and public need, which are brought pursuant to Section 16-50k(a). Several statutory provisions make explicit reference to the development and management plan.

- Section 16-50j(c), concerning the makeup of the Council during proceedings under Chapter 445, specifies that ad hoc members “shall be appointed by the chief elected official of the municipality they represent and shall continue their membership until the council issues a letter of completion of the development and management plan to the applicant.” (Emphasis added.)
- Section 16-50l(d), concerning applications to amend certificates, provides: “No such resolution for amendment of a certificate shall be adopted after the commencement of site preparation or construction of the certificated facility or, in the case of a facility for which approval by the council of a right-of-way development and management plan or other detailed construction plan is a condition of the certificate, after approval of that part of the plan which includes the portion of the facility proposed for modification.” (Emphasis added.)
- Section 16-50v(h) provides: “With regard to any facility described in subsection (a) of section 16-50i, the council shall, by regulation, establish such fees and assessments as are necessary to meet the expenses of the council and its staff in conducting field inspections of (1) a certified project constructed pursuant to a development and management plan, or (2) a completed project for which a declaratory or advisory ruling has been issued.” (Emphasis added.)

Each of these statutory provisions indicates that development and management plans apply only to certification proceedings. In Section 16-50j(c), the use of the word “applicant” indicates that the development and management plan is limited to applications, not petitions. In Section 16-50l(d), the language again applies projects approved pursuant to a development and

management plan as a condition of the certificate. Section 16-50v(h) is the most significant of the three statutory provisions, however. In that section, the legislature demonstrated that it intended to draw a distinction between “certified projects” constructed pursuant to development and management plans and “completed projects for which a declaratory . . . ruling has been issued.” BNE filed a petition for a declaratory ruling, not an application for a certificate.

The Council’s regulations echo this statutory distinction. The Council’s regulations provide for development and management plans for rights-of-way “for any proposed electric transmission or fuel transmission facility for which the council issues a certificate . . .” R.C.S.A. § 16-50j-60(b). The Council’s regulations also provide for development and management plans for “proposed cable antenna television or telecommunications towers and associated equipment or a modification to an existing tower site . . .” R.C.S.A. § 16-50j-75(a). The siting of cable antenna television and telecommunications towers and associated equipment is considered by the Council via certification proceedings.² See Conn. Gen. Stat. § 16-50k. In contrast, the regulations concerning petitions for declaratory ruling makes no mention of a development and management plan. See R.C.S.A. § 16-50j-38–40.

The distinction between certificate applications and declaratory rulings is also reflected in the Council’s regulations concerning fees. See R.C.S.A. § 16-50v-1a (up to \$25,000 fee for filing a certificate, \$500 fee for a petition); see also R.C.S.A. § 16-50v(e) (distinguishing between

² The Grouped Parties are aware from the Council’s docket that modifications to television and telecommunications towers are sometimes considered by the Council via the petition process, and that the Council sometimes approves such modifications subject to conditions that are later worked out in a development and management phase. Even assuming that the Council has the authority to conduct development and management plans in those circumstances, there is no question that BNE is not here seeking a modification to a television or telecommunications tower or associated equipment.

expenses incurred for Council field inspection of a “certified construction project” versus a “project for which a petition for declaratory or advisory ruling was filed”).

The Council is entirely a creature of statute. Our Supreme Court has held:

Administrative agencies [such as the commission] are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves. . . . We have recognized that [i]t is clear that an administrative body must act strictly within its statutory authority, within constitutional limitations and in a lawful manner. . . . It cannot modify, abridge or otherwise change the statutory provisions, under which it acquires authority unless the statutes expressly grant it that power.

Figueroa v. C & S Ball Bearing, 237 Conn. 1, 4 (1996) (applying rule to the Workers’ Compensation Commission); see also Ross v. Planning & Zoning Comm’n of Westport, 118 Conn. App. 55, 58 (2009) (applying rule to planning and zoning commission); Dep’t of Pub. Safety v. Freedom of Info. Comm’n, 103 Conn. App. 571, 576-77 (2007) (applying rule to Freedom of Information Commission).

The express language of the Public Utility Environmental Standards Act and the Council’s own regulations, then, set the limits of the Council’s jurisdiction and ability to command preparation of a development and management plan. Those authorities reveal that the development and management plan does not apply to BNE’s petition. Moreover, absent a grant of express authority from the legislature, the Council does not have the authority to sua sponte begin applying a development and management plan procedure to its petition proceedings. See Figueroa, 237 Conn. at 4; Dep’t of Pub. Safety, 103 Conn. App. at 576-77.

The Council may not, therefore, approve BNE’s petition and rely on the development and management plan as an opportunity to work out the details of the proposed project. BNE’s

petition must be denied for failure to comply with state law, both at the time the petition was filed and after subsequent revision.

VI. BNE's Project Violates Multiple Municipal Ordinances

Pursuant to General Statutes § 16-50x, “[i]n ruling on applications for certificates or petitions for a declaratory ruling for facilities and on requests for shared use of facilities, the council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate.” Accordingly, consideration should be given by the Council to the regulations adopted by the Colebrook Planning and Zoning Commission (“PZC”) and the Colebrook Inland Wetlands Commission (“IWC”), as well as to Colebrook’s Plan of Conservation and Development (“POCD”), which was approved by the PZC in 2005. The Council also should give consideration to any relevant state law and policy.

A. BNE's Project Violates Colebrook Zoning Regulations

As the municipal comments provided to the Council demonstrate, Colebrook has recognized that BNE’s petition “presents . . . several potential violations of the town’s zoning regulations.” (PZC Letter, dated Dec. 16, 2010.) The PZC’s concerns are well founded.

At the outset, Colebrook’s zoning regulations state as one of their purposes “[t]o conserve and maintain the value of land and buildings, and to promote the most appropriate uses of land and buildings especially as recommended in the Town Plan of Conservation and Development.” (Petition, Bulk Filing, Colebrook Zoning Regulations, § 1.1(C).) The regulations make clear that one significant way in which the town has conserved its land is its lack of explicit industrial zones, only allowing certain limited industrial uses within the residential and business zones

established by the regulations, many of which require special exceptions even within the town's business districts. (Id. § 3.9.)

It is undisputed that the parcel on which BNE proposed to site its industrial wind turbines is located in an R-2 residential zone. Pursuant to the regulations, permitted uses in this zone involve dwellings or signage and parking areas, and other uses – including primarily small commercial enterprises and municipal endeavors – may be permitted by special exception. (Id. §§ 3.3, 3.5.) BNE has not applied for a change in zoning. (4/21/11 Tr. 40:2-5 (Garrels).)

Nowhere in the regulations is there any process by which an applicant can site three power-generating industrial facilities that are hundreds of feet tall, least of all in an area currently zoned for residences. Accordingly, the petition violates Colebrook's zoning ordinances, and the Council should, in its discretion, abide by the local determination of appropriate uses within its borders.

B. BNE's Project Violates the Colebrook POCD

In addition to concerns related to violations of the town zoning regulations, the PZC also has indicated to the Council that the petition "contradicts both the spirit and intent of the state-mandated Town Plan of Conservation and Development." (PZC Letter, dated Dec. 16, 2010.)

Again, the PZC properly has recognized that the town's preferences and priorities with respect to development and conservation will be contravened if the Council agrees to grant BNE's petition. The POCD's overarching goal is quoted as follows:

It is the recommendation of this plan to preserve and protect the ecosystems and natural features of Colebrook, including trees, scenic roads, viewsheds, ridgelines, brooks, streams, water bodies, vernal pools, rock outcrops, farms and farmland, forest resources, prime and important agricultural soils, realized and potential aquifers, public water supply lands, wetland soils, and open fields and meadows. The justification for this policy is the community's collective belief in the

importance of conserving our natural resources and our affordable rural way of life.

(Petition, Bulk Filing, Colebrook POCD, page 11.)

Clearly, the three proposed industrial wind turbines that BNE seeks to site in the petition do not assist in preserving and protecting the “natural features” of Colebrook, particularly with respect to the ecosystems and forests that will be disturbed by the project, as well as the natural scenic viewsheds that will be adversely affected by the presence of three 500-foot wind turbines dropped on the landscape. Placement of the BNE turbines on the proposed site also unquestionably will destroy the “rural way of life” preferred by Colebrook’s citizens, instead replacing it with the home to the state’s only large-scale industrial wind farm.

Again, FairwindCT urges the Council to exercise its discretion to consider the town’s locally adopted development preferences, as set forth in the POCD, and to reject the petition in conformance with those preferences.

C. BNE’s Project Violates Colebrook Wetlands Regulations

Apart from issues arising from town planning priorities, the petition violates Colebrook’s regulations governing wetlands and watercourses. The Colebrook IWC has adopted regulations, in accordance with Chapter 440 of the General Statutes, governing activities in inland wetlands and watercourses in town. (Petition, Bulk Filing, Colebrook Inland Wetlands Regulations, § 4.1.)

The site plans associated with the petition in this case provides that certain of the construction activities required to erect BNE’s proposed turbines will affect wetlands and/or watercourses on the proposed site. (Klein Supp. Pre-Filed Testimony, page 2.) It also is undisputed that BNE has failed to obtain a permit from the IWC permitting the operations and uses proposed by BNE in the petition. Pursuant to regulation, certain operations and uses are

permitted in wetlands and watercourses as of right, and certain others are permitted as nonregulated uses. (Petition, Bulk Filing, Colebrook Inland Wetlands Regulations, §§ 4.1, 4.2.) Aside from these categories, all other activities require a permit. (Id. § 4.3.) As BNE's proposed activities do not fall into any of the exceptions identified in the regulations, and because BNE has not obtained a permit from the IWC, the activities proposed by the petition are not in compliance with Colebrook's IWC regulations, and the Council should, in its discretion, defer to the local interest in maintaining the integrity of the town's wetlands and watercourses.

VII. BNE's Project Will Have a Substantial Adverse Effect on Nearby Historic and Natural Resources

As the Council knows, the statutes providing authority to render decisions with respect to locating power-generating facilities explicitly recognize the import of historic preservation by acknowledging the possible adverse effects of such facilities on our state's historic resources. In fact, the legislative finding associated with the Council's enabling jurisdiction recognizes "that power generating plants . . . have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state." Conn. Gen. Stat. § 16-50g. The legislature explicitly set forth that the very purpose of the statutory scheme is to balance the requirement for utility services with the need "to minimize damage to scenic, historic, and recreational values." Id.

**A. BNE's Project Will Adversely Affect Rock Hall,
a Property Listed on the National Register of Historic Properties**

The most developed source of law discussing how to assess potential impacts on historic properties is the National Historic Preservation Act, 16 U.S.C. § 470 et seq. (“NHPA”). While section 106 of the NHPA requires that any federal undertaking consider the effects of such undertaking on any historic properties, the standards established by the regulations implementing the NHPA are appropriate for the Council’s consideration of potential adverse impacts on historic and cultural resources located near the proposed site. Pursuant to these regulations, the agency responsible for the undertaking must identify any historic properties within the “area of potential effects,” which is defined by the regulations as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” 36 C.F.R. § 800.16. Fundamentally, then, the NHPA attempts to identify projects that will alter the “character or use” of nearby historic properties.

As one example of what constitutes an area of potential effects, the Federal Communications Commission has promulgated regulations relating to its responsibilities under Section 106 of the NHPA. In those regulations, the FCC has determined that the presumptive area of potential visual effects for “towers”³ that are more than 400 feet high is anywhere within 1.5 miles from the proposed tower site. 47 C.F.R. part 1, app’x C, section VI.C. Admittedly,

³“Tower” is defined by the regulations as “Any structure built for the sole or primary purpose of supporting Commission-licensed or authorized Antennas, including the on-site fencing, equipment, switches, wiring, cabling, power sources, shelters, or cabinets associated with that Tower but not installed as part of an Antenna as defined herein.” 47 C.F.R. part 1, app’x C, section II.A.14.

there is no federal rule or regulation that is specific to conducting a Section 106 review of a wind turbine project. However, that 1.5-mile presumption should logically serve as a guide for your review of these projects. We urge the SHPO to consider the 1.5-miles as only a minimum presumptive area of potential effects, because the size, scope, movement and noise associated with the wind turbines that BNE seeks to site obviously make their impacts far greater than the stationary towers that are the subject of the FCC regulation. (Pre-Filed Testimony of Wilson H. Faude, dated Mar. 15, 2011, at 4.)

There is no dispute that Rock Hall Inn, located at 19 Rock Hall Road and listed on the National Register of Historic Places, is located within even the conservative 1.5-mile area of potential effects from this project. (*Id.*) Accordingly, there can be a presumption of adverse effect that the Council should require BNE to bear the burden to rebut. However, even absent the presumption, the evidence presented in the course of this proceeding reveals that the petition will have an adverse effect on Rock Hall. These adverse effects include:

- Year-round visibility of the wind turbines subject to this Petition;
- Adverse noise impacts (see the section on Noise for discussion); and
- Adverse impacts associated with shadow flicker (see section on Shadow Flicker for discussion).

As the above demonstrates, the evidence is clear that the petition will have significant adverse effects on a nearby historic property, a factor relevant to the Council's determination regarding whether to site the proposed project. In light of such impacts, the Council should protect and preserve Rock Hall and deny the petition.

B. The Petition Will Adversely Affect Beckley Bog, a National Natural Landmark

In addition to Rock Hall, the project is likely to have an adverse impact on Beckley Bog, a National Natural Landmark⁴ located on Nature Conservancy property in Norfolk that abuts the proposed site. Beckley Bog is the most southerly sphagnum-heath-black spruce bog in New England and possesses all of the principal elements of a boreal bog. It is a rare relic of the early Pleistocene epoch and was designated a National Natural Landmark in 1977. Connecticut has only 8 of the 586 sites listed on the National Registry of Natural Landmarks. (FairwindCT Admin. Notice Item No. 70.) Substantially all of Beckley Bog is located within 1.25 miles of all three proposed turbines.

As a result of the Bog's close proximity to the project, there will be significant adverse visual, noise, and shadow flicker effects on this designated natural landmark. The Council should exercise the opportunity to ensure the continuing protection of this ecological resource, as directed in the General Statutes mandate governing the Council's jurisdiction.

VIII. BNE's Proposed Setbacks Are Inadequate to Protect Public Health and Safety

Adequate setbacks could solve all public health and safety concerns of the proposed project. Placement of wind turbines at a sufficient distance away from persons and property would eliminate concerns of ice throw, ice drop, shadow flicker and noise. Although the State of

⁴ The National Natural Landmarks Program was established by the Secretary of the Interior in 1962, under authority of the Historic Sites Act of 1935 (16 U.S.C. § 461 *et seq.*) to identify and encourage the preservation of the full range of geological and biological features that are determined to represent nationally significant examples of the Nation's natural heritage. Potential sites are evaluated by qualified scientists and, if determined nationally significant, recommended to the Secretary of the Interior for designation. Once a landmark is designated it is included on the National Registry of Natural Landmarks, which currently lists 586 National Natural Landmarks nationwide. (FairwindCT Admin. Notice Item No. 70.)

Connecticut does not currently have regulations for the siting of wind turbines, nor setback requirements for them, science indicates that the further the turbines are away from property lines, the less impact they have. BNE has failed to present a petition with adequate setbacks to protect public health and safety. The wind turbine manufacturer, GE Energy, recommends a setback for the proposed turbines of 898 feet for the 82.5-meter blade diameter and 984 feet for the 100-meter blade diameter. (FairwindCT Supp. Admin. Notice Item No. 13 (GE Energy, Setback Considerations for Wind Turbine Siting). Seven property lines, including four residential property lines, are within 984 feet of one or more of the proposed turbines. (BNE Responses to FairwindCT's First Set of Interrogatories, Answer 41 & Ex. 1.) Not only does BNE's proposed project fail to meet the recommended setbacks of GE, but further GE's recommended setback inadequate to protect person and property from the hazards of wind turbines.

Ice can be thrown from one of the proposed turbines a distance in excess of the GE recommended setbacks. An ice fragment can be thrown an estimated 285 meters (935 feet) or more from the GE 1.6-100 and 265 meters (869 feet) or more from the GE 1.6-82.5. (Heraud Pre-Filed Testimony Mar. 14, 2011, page 3.) A turbine placed at or beyond GE's recommended setback would not be safely out of distance for ice thrown to impact an abutting property. Five property lines, including three residential property lines, are within 869 feet of one or more of the proposed turbines. Six property lines, including four residential property lines, are within 935 feet of one or more of the proposed turbines. (BNE Responses to FairwindCT's First Set of Interrogatories, Answer 41 & Ex. 1.)

The maximum distance ice could drop with the 100-meter diameter blades is 104 meters, or approximately 341 feet. (Heraud Pre-Filed Testimony, Ex. 2, page 10.) There are three property lines located within that distance from proposed turbine locations. (BNE Responses to FairwindCT's First Set of Interrogatories, Answer 41 & Ex. 1.) Turbine 1 is just 140 feet from a residential property line to the south of the site, located at 45 Flagg Hill Road, and Turbine 3 is 235 feet from the Nature Conservancy's property line to the west of the site and is 265 feet from the gun club's property to the north of the site. (BNE Responses to FairwindCT's First Set of Interrogatories, Answer 41 & Ex. 1.) Ice could therefore drop beyond the boundaries of the site onto three different properties, one of which is residential.

"Shadow flicker," an annoyance unique to wind turbines, is defined as the effect of alternating changes in light intensity of the sun caused by the rotating blades of the turbine casting a moving shadow to a nearby area. Under certain circumstances, shadow flicker can be cast through an unobstructed window of a home, so that a room could experience repetitive changes in brightness. Shadow flicker can also occur outside by casting alternating shadows. (Libertine Pre-Filed Testimony, Ex. 3, pages 1-2.) 75 occupied structures within the 2,000 meter (6,561 feet) radius area studied by BNE's expert for shadow flicker impact were identified experiencing shadow flicker occurrences for both the 82.5 meter and the 100 meter blade shadow flicker analyses. (Libertine Pre-Filed Testimony, Ex. 3, page 3; BNE's Amended Responses to Council's Interrogatories, Set One, Ex. 3, page 8.) If BNE constructs Wind Colebrook South using the 82.5-meter diameter blades, Robin Hirtle, the owner of the residential property located at 29A Flagg Hill Road, 740 feet from Turbine 1 and 895 feet from Turbine 2, can expect to have worst-case shadow flicker every evening between March 24 and April 30. Depending on the day,

Ms. Hirtle may experience between 12 minutes and 55 minutes of shadow flicker every evening during this period. Shadow flicker will return to her house every evening between August 12 and September 19, during which time Ms. Hirtle can expect flicker of a duration between 7 minutes and 55 minutes a day. (Libertine Pre-Filed Testimony, Ex. 3, App'x B (receptor B).) Clearly the shadow flicker impact on Ms. Hirtle's residence would be reduced if Turbine 1 and Turbine 2 were located further away from her home.

At the property boundary of the site, modeled noise conditions indicate potential for these wind turbines to be in excess of 6 to 10 dB above the permitted limits at night pursuant to the Connecticut Department of Environmental Protection (CTDEP) noise regulations (Regulations of Connecticut State Agencies (RCSA) Title 22a, Section 22a-69-1 and 22a-69-7). (Noise Control Engineering, Inc. Supp. Pre-Filed Testimony Apr. 4, 2011, page 3 and Ex. 6.) Wind turbines constructed within 1,000 square feet of abutting property lines, as is proposed in the Petition, will result in noise disturbance to those abutting property owners. There are no noise control treatments such as barriers, silencers or acoustic cladding that can be added after the wind turbine is installed to reduce the noise. The only method of minimizing noise after the fact is to shut the turbine down during windy conditions. (Bahtiarian Pre-Filed Testimony, dated Mar. 15, 2011, page 11.)

As proposed, the project contemplates placement of industrial wind turbines less than 1,000 square feet from residential property lines. The project fails to meet the recommended setback identified by GE Energy with seven property lines, including four residential property lines, within 984 feet of one or more of the proposed turbines. GE's recommended setback in itself is inadequate given that properties within their recommended setback are not safe from the

hazards of ice throw, shadow flicker and noise. Adequate setbacks could solve all of these public health and safety concerns of the proposed project.

IX. BNE Has No Mitigation Plan for the Annoyance Created by Shadow Flicker

“Shadow flicker,” an annoyance unique to wind turbines, is defined as the effect of alternating changes in light intensity of the sun caused by the rotating blades of the turbine casting a moving shadow to a nearby area. (Libertine Pre-Filed Testimony, Ex. 3, pages 1-2.) Accordingly, shadow flicker can have both an adverse impact on the health and well-being of the residents living in areas subject to the phenomenon.

A. BNE’s Shadow Flicker Studies are Not Reliable

The shadow flicker studies submitted into the record by the petitioner are not reliable, and, accordingly, BNE has not met its burden to establish that shadow flicker effects will not adversely impact nearby residents and properties. The shadow flicker studies submitted by BNE is defective for the following reasons:

- The study was performed by Michael Libertine of VHB, a purported expert who had never conducted a shadow flicker study and analysis prior to being hired by BNE to conduct the studies associated with the proposed wind turbine projects in Prospect and Colebrook;
- The study relied exclusively upon WindPRO software, which is a developmental modular-based software package developed by EMD International that was designed for the wind industry for the planning and evaluation of wind power projects, which does not appear to have previously been used to produce evidence in Connecticut proceedings. Mr. Libertine’s use of the software has not benefited

from full discovery, including the deposition of those who have used the software, and reliance on the accuracy of the result does not appear to be warranted. Time constraints imposed by the Siting Council process prevented adequate cross-examination of Mr. Libertine to determine if the appropriate foundation for computer-generated evidence, as required by State v. Swinton, 268 Conn. 781, 847 A.2d 921 (2004), could even be established for the use of WindPRO;⁵

- The study assumes, without any evidence to establish that this assumption was sound, that at distances greater than a 2,000 meter (6,561 feet) radius from the turbines, the frequency of shadow flicker occurrence is low enough and its intensity faint enough to not be a distraction to human activities. (Libertine Pre-Filed Testimony, Ex. 3, page 4.);
- The study fails to show a shadow for Turbine 3. Mr. Libertine explained that the computer model did not pick up any shadow being thrown on the 75 selected receptor locations by Turbine 3, but he would not represent that there is no flicker from Turbine 3. (Tr. 4/26/2011, Pg. 129 Ln: 2-21); and
- The study used an arbitrary “probable-case scenario” achieved by using the software’s worst-case assumptions and reducing the result by 50%. No meaningful statistical evidence was submitted to substantiate this assumption.

⁵In fact, counsel for the Grouped Parties had only asked Mr. Libertine 29 questions when the chairman warned counsel that only 5 minutes remained available time for cross-examination by the Grouped Parties. Had an additional time been afforded for cross-examination, counsel would have been able to explore the topic in depth.

For the above reasons, the petitioner has failed to submit reliable evidence related to shadow flicker into the record, and, accordingly, the petitioner has failed to demonstrate that shadow flicker will not pose a problem to nearby residences and properties.

B. BNE's Project Will Subject Nearby Properties to Unacceptably High Levels of Shadow Flicker

While there are no federal or State of Connecticut standards for exposure to shadow flicker, some other countries have adopted standards that limit shadow flicker to amounts ranging from 8 hours per year to 30 hours per year at an occupied structure. (Libertine Pre-Filed Testimony, Ex. 3, pages 6-7.) With the 30-hour per year standard relied upon by Mr. Libertine comes with an additional limitation that no one receptor may be subjected to more than 30 minutes per day of shadow flicker. Denmark has an unofficial guideline of 10 hours per year, and Sweden uses 8 hours per year. (4/26/2011 Tr. 126:11-9 (Libertine).)

In this case, a total of seven receptors are predicted to experience shadow flicker at some time during the year, with annual durations ranging from nearly 10 hours to over 48 hours. One receptor is predicted to experience more than 30 hours per year; three receptors are predicted to experience between 20 and 30 hours; and three receptors between approximately 10 and 17 hours annually. (Libertine Pre-Filed Testimony, Ex. 3, page 7.) Mr. Libertine's optimistic probable case model evaluated 75 dwellings, and 6 are expected to experience nearly 10 hours to 27.5 hours of shadow flicker per year.

On a worst-case basis, the same properties (excluding 17 Flagg Hill Road, owned by BNE) would experience between 55 hours and nearly 20 hours of shadow flicker a year, ranging to 57 minutes per day during certain times of the year. (Libertine Pre-Filed Testimony, Ex. 3, Table 4). Even apart from these structures, other properties will still experience significant

shadow flicker. For example, according the raster image map, receptor AO is the grounds, not the building, at 117 Pinney Street, and under the probable case will be assaulted with less than 10 hours of shadow flicker a year. (Libertine Pre-Filed Testimony, Ex. 3, Figure 1; Tr. 4/26/2011, 133:12-135:12 (Libertine).)

Other areas, including portions of Route 44, will experience 10 to 20 hours of shadow flicker each year. The times of year were not calculated, so one cannot draw a conclusion as to the effects on traffic. (Libertine Pre-Filed Testimony, Ex 3, fig. 1; Tr. 4/26/2011, 131:23-132:7 (Libertine).)

Beckley Bog will experience, probable case, less than 10 hours of shadow flicker a year. The amount of worst-case shadow flicker is not provided in BNE's analysis. (Libertine Pre-Filed Testimony, Ex. 3, fig. 1; Tr. 4/26/2011, 131:12-22 (Libertine).). The effect of shadow flicker on wildlife in Beckley Bog is unknown. Mr. Tidhar did not do any analysis of the habitat of Beckley Bog in conjunction with Wind Colebrook South; shadow flicker effects on wildlife are not part of his expertise. Mr. Tidhar was unfamiliar with both Beckley Bog and the National Natural Landmark program. (Tr. 4/14/2011, 114:14-115:1 (Tidhar).)

The owner of 29A Flagg Hill Road can expect to have worst-case shadow flicker daily starting March 24 through April 30 each year starting in the evening, and depending on the day may experience between 12 minutes and 55 minutes of shadow flicker per day. Shadow flicker returns on the evening of August 12 and continues until the evening of September 19 each year and can be expected to have a duration of anywhere between 7 minutes and 55 minutes a day. (Libertine Pre-Filed Testimony, Ex. 3, App'x B (receptor B).)

A comparison of the Table 4 created Mr. Libertine for the 82.5 meter blades and the 100 meter blades shows an error in caring values from Appendix A and B to Table 4. In Table 4, the worst-case max minutes per day is improperly reported. Instead, the maximum number of days of flicker a year, as reported in that column. FairwindCT's Findings of Fact corrects the values. The values do however, remain suspicious.

In the analysis for the 100-meter diameter blades, the worst-case hours per year for Ms. Robin Hirtle, who lives at 29A Flagg Hill Road, is reported as 58:11; the same value for the 82.5 meter blades is 55:04. For every other address reported by Mr. Libertine in each Table 4, the worst-case hours per year do not change between the types of blades. No explanation is offered as to why only the values for 29A Flagg Hill Road are increased by slightly more than 3 minutes, but none of the other values change.

Accordingly, it is evident that the amount of shadow flicker established by BNE's reports, even if reliable, fail to prove that the flicker effects produced by the proposed turbines are within commonsense standards for permissible impacts. However, FairwindCT concedes that these substantial flicker effects alone should not be a basis for denying the petition, as the condition is ultimately manageable and may be mitigated. In this case, though, BNE has offered no mitigation plan for shadow flicker. Given that flicker is predictable, with a start and stop time known for each turbine, were the petition granted, BNE should be required to manage turbine operations so there is no resulting flicker. Known flicker events could be programmed into a computer to make sure that the offending turbines were turned off during times of predicted flicker.

In any event, this Council does not have the authority to establish a nuisance; should it permit BNE to cite wind turbines at the Wind Colebrook South location, the Council does not have authority or the ability to prevent future actions for nuisance based on shadow flicker. See generally Walsh v. Town of Stonington Water Pollution Control Auth., 250 Conn. 443, 736 A.2d 811 (1999). If turbine management to prevent flicker is not part of the initial operations plan, it can always be added by a superior court judge.

X. Council Rulings Have Violated FairwindCT's Statutory and Due Process Rights

The UAPA and our Supreme Court have provided broad instruction on the procedures applicable to hearings before administrative agencies. In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved. . . . In contested cases: . . . [a]ny oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence[.][A] party and such agency may conduct cross-examinations required for a full and true disclosure of the facts. . . . Although hearings before administrative agencies are not governed by the strict rules of evidence, they must be conducted so as not to violate the fundamental rules of natural justice. . . . [W]e have recognized a common-law right to fundamental fairness in administrative hearings. . . . Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence. . . . The agency is not required to use the evidence and materials presented to it in any particular fashion, as long as the conduct of the hearing is fundamentally fair.

Evans v. Freedom of Information Com'n, Superior Court, judicial district of New Britain, Docket No. CV040527344, 2005 WL 2129067, at *5 (Aug. 10, 2005, Owens, J.T.R.) (Alterations in original; citations omitted; internal quotation marks omitted).

Particularly with respect to the right to cross-examination, the Connecticut Supreme Court also has recognized that “the procedures required by the UAPA exceed the minimal procedural safeguards mandated by the due process clause.” Pet v. Dep’t of Public Health, 228 Conn. 651, 662, 638 A.2d 6 (1994) (internal quotation marks omitted). Specifically, General Statutes § 4-178(5) states that “a party . . . may conduct cross-examinations required for a full and true disclosure of the facts.”

Explaining this right, the Connecticut Supreme Court has stated that

‘the test of cross-examination is whether there has been an opportunity for full and complete cross-examination rather than the use made of that opportunity.’ (Internal quotation marks omitted.) Pet v. Dept. of Health Services, 228 Conn. 651, 663, 638 A.2d 6 (1994); see General Statutes § 4-178(5) (pursuant to the Uniform Administrative Procedure Act, ‘a party ... may conduct cross-examinations required for a full and true disclosure of the facts’); Gordon v. Indusco Management Corp., 164 Conn. 262, 271, 320 A.2d 811 (1973) (party must be able to ‘substantially and fairly [exercise]’ right of cross-examination). To establish a violation of the right to cross-examination, a party who has been deprived of its opportunity to conduct a full and complete cross-examination must additionally show that such deprivation has caused substantial prejudice. See Pet v. Dept. of Health Services, supra, at 663-64, 638 A.2d 6; Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council, 215 Conn. 474, 489, 576 A.2d 510 (1990).

Ann Howard’s Apricots Restaurant, Inc. v. Com’n on Human Rights and Opportunities, 237 Conn. 209, 230-31, 676 A.2d 844 (1996) (alterations in original).

The proceedings in this case fail to satisfy both the “fundamental fairness” standard established by due process and the standards for meaningful and effective cross-examination, as

expressly granted by the UAPA in General Statutes § 4-178(5). Specifically, the Council has violated FairwindCT's rights to due process and meaningful cross-examination as a result of the following evidentiary rulings:

- The Council repeatedly overruled FairwindCT's objections to the hearing procedures associated with this Petition, particularly with respect to the arbitrary time limits placed upon opponent cross-examination, which was required to be shared among six groups;
- On April 14, 2011, granting BNE's objection to the inclusion of Mr. Frederick Riese of the DEP as a witness to be cross-examined by FairwindCT;
- On April 21, 2011, the Council denied a motion filed on April 20, 2011, objecting to the disclosure of an expert report by the Petitioner the day before the close of the evidentiary hearing in this Petition;
- On three occasions, the Council denied motions to compel interrogatory responses, or, in the alternative, motions to strike, filed by FairwindCT, which sought to require the Petitioner to fully and fairly respond to interrogatories to which the Petitioner had filed groundless objections;
- On April 14, 2011, the Council, over FairwindCT's objection, implemented a protective order in this case, under which the Petitioner could file certain material relevant to the petition under seal, and which did not allow dissemination to a party's expert witnesses or viewing at any site other than the Council offices, where parties, even after signing a non-disclosure agreement, were not permitted to take notes regarding the material's content; and

- On March 31, 2011, the Council denied FairwindCT's motion requesting that the Council issue a subpoena requiring the attendance and testimony of Michael Guski, Principal of Epsilon Associates, which the Council had hired as a consultant in association with its consideration of the Petition.

Each of these decisions caused substantial prejudice to FairwindCT by depriving it of the opportunity to fully and fairly present evidence in opposition to the petition, particularly with respect to meaningful cross-examination of evidence submitted into the record by the petitioner. Specifically, FairwindCT (and its retained expert witnesses as its agents) was deprived of the ability:

- To have adequate time to conduct complete and meaningful cross-examination of the Petitioner's expert witnesses during this first-of-its-kind Petition;
- To adequately cross-examine the petitioner with respect to evidence submitted into the record on the eve of hearings at which FairwindCT was afforded its only opportunity to examine the petitioner's witnesses;
- To receive from the petitioner full and fair answers to relevant interrogatories seeking additional information related to the petition, with which FairwindCT would have obtained additional material for cross-examination and/or additional evidence for use in opposition to the petition;
- To use in any meaningful way material filed under seal by the petitioner and subject to the Council's protective order, which material – consisting of hundreds

of pages of technical documents and thousands of lines of wind data – in many ways formed the basis for the petition;⁶ and

- To access the consultant employed by the Council to provide assistance with respect to its consideration of the Petition, which consultant undoubtedly provided information that the Council will use in reaching its decision.

Accordingly, as the foregoing demonstrates, the proceedings violate due process protections and statutory rights afforded to FairwindCT by the UAPA, and FairwindCT requests that the Council deny the petition pending additional proceedings that comply with such requirements.

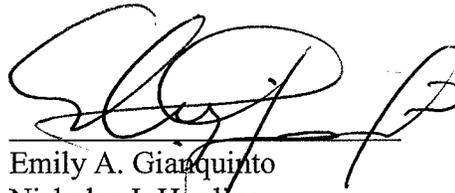
CONCLUSION

BNE has failed to carry even its minimal burden of demonstrating that its petition complies with DEP water quality standards. That fact alone is reason enough for the Council to deny this petition for declaratory ruling. BNE has also failed to demonstrate compliance with DEP noise regulations and has failed to show that its proposed project will not have a substantial adverse environmental effect and that there are no feasible and prudent alternatives to its proposed activities. The defects in BNE's petition were not cured despite significant revision from the time of filing, and they cannot be cured in a development and management plan because development and management plans do not apply to petitions.

Therefore, the Council must deny BNE's petition for declaratory ruling.

⁶ The Grouped Parties expressly rely upon and incorporate by reference their Objections, dated March 22, 2011, and their Objection to and Motion to Modify, including the Affidavit of Emily A. Gianquinto, dated April 19, 2011.

By:



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CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail and e-mail to the following service list on the 20th day of May, 2011:

Lee D. Hoffman
Bonnie L. Heiple
Paul Corey
Thomas D. McKeon
David M. Cusick
Richard T. Roznoy
David R. Lawrence and Jeannie Lemelin
Walter Zima and Brandy L. Grant
Eva Villanova

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King



Emily A. Gianquinto