



March 25, 2014

Thomas S. Burack, Chair  
New Hampshire Site Evaluation Committee  
P.O. Box 95  
Concord, NH 03302

**Re: Notice of Pre-rulemaking Process**

Dear Chairman Burack:

This document reflects the joint effort of the Appalachian Mountain Club, Audubon Society of New Hampshire, Conservation Law Foundation, Society for the Protection of New Hampshire Forests, and The Nature Conservancy to identify potential rules and principles for siting criteria to be established by the NH Site Evaluation Committee (SEC) as required by SB99. It is being submitted in response to the SEC's Notice of Pre-rulemaking Process (undated).

Our organizations recognize that all energy sources have environmental impacts. This document seeks to better define the appropriate balance between important public policy goals – the development of an environmentally appropriate energy supply system for New Hampshire and the protection of the important natural and cultural values of the state's landscape. The organizations identified above share the view that reasonable regulations establishing siting criteria (and addressing other siting issues) will clarify the process and standards for the SEC's review of energy facilities as well as strengthen the SEC's ultimate decisions on applications for certificates.

This document sets forth a framework for proposed rules for consideration by the SEC as part of the Office of Energy and Planning's process under Senate Bill 99, which requires the SEC to adopt comprehensive siting criteria for energy facilities in rules by January 1, 2015. The framework (included as Attachment 1) is intended to be applicable to all energy and transmission facilities. However, it is not intended to be comprehensive as some subjects addressed by SEC rules are beyond our areas of focus or expertise. We have attempted to make the attached framework consistent with the SEC's existing rule structure.

Per statute the SEC may only issue a certificate for an energy project if the following findings are made:

- a) The applicant has “adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.”
- b) The site and facility “will not unduly interfere with the orderly development of the region with due consideration given to the views of municipal and regional planning commissions and municipal governing bodies.”
- c) *The site and facility “will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.”*

This framework primarily address part (c), in particular the issues of the natural environment and aesthetics. It includes two basic sets of decision-making criteria: (1) clear grounds for the SEC to conclude that a facility will cause an “unreasonable adverse effect” on a resource identified in the statute, and (2) clear grounds for the SEC to conclude that a facility will not cause an “unreasonable adverse effect.” Under this approach, these criteria would be neither exclusive nor dispositive; the SEC retains the ultimate judgment on whether or not a particular facility causes an unreasonable adverse effect on a resource. In the case of aesthetics, the framework also provides a description of the visual impact analysis that must be submitted with an SEC application.

The framework also includes generally applicable provisions pertaining to resolving adverse impacts, decommissioning, the use of best practical mitigation, and monitoring and adaptive management.

In general, for all resource categories, the framework provides that the SEC’s evaluation of facility impacts shall reflect the “avoid, minimize, mitigate” hierarchy of resolving adverse resource impacts:

- In the first instance, the facility should be proposed and designed to avoid adverse impacts on the resources identified in N.H. RSA ch. 162-H. Avoidance can occur at two levels. At the broadest level, some sites should be avoided in their entirety. During their initial site screening process, developers may eliminate some sites from consideration due to significant and unresolvable resource conflicts, or the SEC may subsequently conclude that a site proposed by an applicant should be avoided in its entirety due to the “unreasonable adverse effects” of the facility. At another level, avoidance may take place within a facility through proper design that avoids impacts to localized resources such as wetlands, rare plant sites, or habitats that support significant wildlife species.
- In some cases where adverse impacts cannot be avoided, measures that sufficiently minimize adverse effects identified in the SEC’s review of the facility may support a finding that such adverse effects are not unreasonable.
- In certain circumstances, adverse impacts may be minimized to acceptable levels through on-site mitigation measures or (where on-site mitigation measures are impractical or insufficient) off-site mitigation measures to support a finding that such adverse effects are not unreasonable. Mitigation measures must address the

resource category adversely affected, reflect the best practical mitigation under the circumstances, and ensure resource benefits that exceed the adverse effects on the impacted resource. For example, permanent conservation of land with higher levels of ecosystem services or scenic value may in some circumstances provide appropriate mitigation for a facility's adverse impacts on the natural environment or aesthetics, respectively, which cannot be reasonably avoided or minimized. Because impacts to wildlife (including migratory bats and birds) are cumulative, funding for research may serve as mitigation as long as it can inform adaptive management strategies that reduce mortality and displacement of impacted species.

- It is important to emphasize that minimization and mitigation are appropriate for some, but not all, impacts. In some cases avoidance is the only appropriate option to ensure the protection of natural or aesthetic resources that would be adversely impacted by facility development.

We have also provided more general concepts and principles for addressing certain other issues without proposing a specific suggested framework (see Attachment 2).

We will remain actively engaged in the rule-making process as it proceeds over the coming year, and are ready to offer any assistance that will help you in this effort. If you have any questions about this submission please do not hesitate to contact us.

Sincerely,

Susan Arnold  
Appalachian Mountain Club

Carol Foss  
Audubon Society of New Hampshire

Christophe Courchesne  
Conservation Law Foundation

Chris Wells  
Society for the Protection of New Hampshire Forests

Jim O'Brien  
The Nature Conservancy



**THE FOLLOWING TO BE ADDED TO CHAPTER 100, PART 102 (DEFINITIONS):**

1. “Rare plant” means any species included on the most recent version of the “Rare Plant List for New Hampshire” maintained by the New Hampshire Natural Heritage Bureau.
2. “Natural community” means a recurring assemblage of plants and animals found in particular physical environments as classified in the New Hampshire Natural Heritage Bureau publication *Natural Communities of New Hampshire*. Rare natural communities are those ranked S1 (critically imperiled), S2 (imperiled) or S3 (very rare and local). Exemplary natural communities are those that have had relatively little alteration from human activity and retain a relatively natural composition and structure, including high-quality examples of common natural communities (i.e., those ranked S4 or S5).
3. “Steep or fragile soil” means any soil classified by the US Natural Resource Conservation Service as having moderate or severe hazard of erosion, soils which are classified as very poorly drained or which meet any of the criteria for hydric soils, and any slopes over 20%.
4. “Waters and wetlands” means the full range of issues related to the flow of water across and through the landscape, including impacts to groundwater, streams, lakes, ponds, wetlands, seeps and springs and their associated shoreline or buffer (“riparian”) areas.
5. “Wildlife” means, as defined under NH RSA 207.1, XXXV, “all species of mammals, birds, fish, mollusks, crustaceans, amphibians, invertebrates, reptiles or their progeny or eggs which, whether raised in captivity or not, are normally found in a wild state.”
6. “Significant wildlife species” means 1) any species listed as Threatened or Endangered, or which is a candidate for such listing, by the U.S. Fish and Wildlife Service; or 2) any species listed as Threatened, Endangered or Special Concern by the New Hampshire Department of Fish and Game.
7. “Cumulative impact” means the incremental adverse effect of an energy facility on the resource values set forth in NH RSA 162-H:16, IV(c) when added to other existing and reasonably likely development. Cumulative impacts can result from individually minor but collectively significant developments taking place over a period of time. The committee may analyze cumulative impacts with reference to legal standards established under the National Environmental Policy Act, as amended, to the extent consistent with this definition<sup>1</sup>.

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<sup>1</sup> The committee may also consult federal guidance documents regarding the analysis of cumulative impacts, including but not limited to those prepared by the Council on Environmental Quality (see [http://energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/G-CEO-ConsidCumulEffects.pdf](http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEO-ConsidCumulEffects.pdf)) and the Environmental Protection Agency (see <http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf>).

8. “Reasonably likely development” means, with respect to energy facilities, any energy facilities for which an application for a certificate has been filed with and determined complete by the Site Evaluation Committee, for which an application for federal permitting or approval has been filed, or for which an application for local land use approvals has been filed. “Reasonably likely development” means, with respect to development that is not energy facilities, proposed development activities of a significant scale for which an application for federal, state, or local approvals has been filed.
9. “Scenic Viewpoint” means any publicly accessible point or route that (i) provides a focal point for aesthetic enjoyment of a generally natural landscape beyond the immediate vicinity or (ii) is an integral part of the setting of a historic property. Scenic Viewpoints may include, for example, viewpoints from: (a) a national natural landmark, federally designated wilderness area or other comparable outstanding natural or cultural feature such as the Appalachian National Scenic Trail, (b) Federal, state or municipal conservation and/or recreation lands that have an established trail system and receive public recreational use, (c) privately-owned conservation lands that receive public recreational use, (d) lands encumbered by a conservation easement in which aesthetic or recreational values are expressly recognized and that receive public recreational use, (e) recreational trails or trail networks established, protected or maintained in whole or in part with public funds, (f) Great Ponds, (g) segments of a National Wild and Scenic River or river designated in the New Hampshire Rivers Management and Protection Program, (h) other navigable rivers used by the public for motorized or non-motorized recreational boating, (i) designated scenic byways, (j) designated scenic turnouts on public roads, (k) property that has been listed or is eligible for listing in the state or national register of historic places, (l) locally-designated recreation areas, (m) any other viewpoint which by the weight of evidence meets the spirit and intent of this definition. Scenic Viewpoints do not necessarily include all points affording screened, transient, or intermittent views of a facility, but rather those points or routes from which aesthetic enjoyment is a significant component of the user experience.
10. “Significant Scenic Viewpoint” means a Scenic Viewpoint that is of regional, statewide, or national significance because it (a) is located within conservation land or on a resource of recognized importance, (b) is a viewpoint that receives a high level of regular public use, (c) is a recognized viewpoint that serves as a destination or focal point for recreational activity and scenic enjoyment, and/or (d) has views from or one or more historic properties within a setting exhibiting high scenic integrity. Multiple Scenic Viewpoints may together provide a series of views that collectively meet this definition and therefore constitute a Significant Scenic Viewpoint. Significant Scenic Viewpoints are intended to encompass the state’s most important scenic resources, which are irreplaceable components of the state’s natural, cultural and economic landscape. Lands or resources with Significant Scenic Viewpoints are listed in Table 1. [not included, to be developed]
11. “Visual impact” means a change in aesthetics and visual resources which occurs when, relative to a public view:

(a) features are altered, introduced, made less visible, or are removed, such that the resultant effect on public views is perceptibly incongruous with the inherent, established character of the landscape; and/or

(b) access to public views is substantially diminished or eliminated by screening or blocking of the affected view; and/or physical access to public viewing positions is substantially restricted or eliminated.

Changes that seem incongruous are those that demonstrably appear out of place, discordant, or distracting.

12. "Best practical mitigation" means methods or technologies used during construction or operation of an energy development that control or reduce to the lowest feasible level impacts to aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

13. "Adaptive management" means a system of management practices based on clearly identified desired outcomes, monitoring to determine if management actions are meeting outcomes, and, if not, provisions for management changes that will best ensure that outcomes are met or that outcomes are re-evaluated.

**THE FOLLOWING SHALL BE ADDED TO SECTION 300 IN SUPPORT OF THE REQUIREMENT OF SECTION 301.03(i):**

**PRE-APPLICATION IMPACT STUDIES**

1. Studies to determine the impact of the facility on historic sites, air quality, water quality, the natural environment and public health and safety shall be designed in consultation with the appropriate state agencies, including but not limited to the Department of Environmental Services, the Department of Fish and Game, the Department of Resources and Economic Development, the Natural Heritage Bureau, and the Division of Historical Resources.
2. Applicants are encouraged to consult with other parties with relevant knowledge and expertise, including but not limited to municipal officials, non-governmental organizations, academic institutions and resource professionals, for input on both issues that need to be addressed by impact studies and the appropriate methodology for conducting such studies.

**VISUAL IMPACT ANALYSIS**

1. All applicants for a certificate shall prepare a Visual Impact Analysis (VIA) using generally accepted professional standards.
2. The VIA shall identify all parts of the landscape within at least 10 miles of the facility from which the facility will be potentially visible, based on both bare ground conditions (i.e. topographic screening only) and with consideration of screening by vegetation or other factors. Distances beyond 10 miles may be appropriate for energy or transmission facilities that have extensive and dominant visual reach due to lighting requirements, height or other factors.
3. The VIA shall specifically identify all specific areas, sites or features of human use within at least 10 mile radius from which the facility will be potentially visible, including but not limited to Significant Scenic Viewpoints, Scenic Viewpoints, town or village centers, residential areas, public roads, and recreational areas.
4. For all Scenic Viewpoints and Significant Scenic Viewpoints from which the facility will be potentially visible, the VIA shall categorize the visual impact as high, medium or low based on the following criteria:
  - a) Facility impacts:
    - i. the extent of facility infrastructure (including but not limited to structures, access roads and transmission lines) visible from the Viewpoint;
    - ii. the distance of the facility from the Viewpoint;
    - iii. the nature and magnitude of the visibility of directly viewed or atmospherically-reflected nighttime lighting;

- iv. the sun angle and pathway as it influences facility illumination
  - v. The scale of the facility relative to surrounding topography and existing structures;
  - vi. The existing character of the landscape as seen from the Viewpoint, including the extent, nature and prominence of existing human development;
  - vii. The prominence and incongruity of the facility in the landscape as compared to existing human development;
  - viii. The significance of the Viewpoint from which the facility will be visible;
  - ix. The expectations of the typical viewer;
  - x. The extent, duration and character of public use of the Viewpoint; and
  - xi. The potential effect of the facility's presence on the public's continued use and enjoyment of the Viewpoint.
- b) Cumulative impact: The scope and scale of the potential effect of the facility from the Viewpoint in combination with other existing or reasonably likely development.
5. The VIA shall include visual simulations of the facility from all Significant Scenic Viewpoints and representative other Scenic Viewpoints identified in the VIA from which any part of the facility will be visible.
6. Visual simulations shall represent conditions of maximum visibility (i.e., a clear day with a sun angle providing maximum illumination of the facility as seen from the selected viewpoint).
7. For concentrated industrial energy generation facilities (including but not limited to those utilizing natural gas, oil, coal or biomass) that are located on previously developed sites within heavily developed areas, and for which the aesthetic impacts are limited to developed areas within relatively close proximity to the facility, the SEC may at its discretion waive the requirements of this section and substitute other evaluation requirements appropriate for the proposed facility, site and vicinity.

**THE FOLLOWING SHALL BE ADDED AS A NEW SECTION IN CHAPTER 300:****General Standards**

1. The SEC shall consider the impacts to the resources set forth in NH RSA 162-H:16, IV(c) both individually and in combination. Impacts to multiple resources, none of which in itself is sufficient to create a finding of unreasonable adverse effect, may be sufficient to create such a finding when considered in combination.
2. In addition to considering the impacts of the proposed facility in isolation, the SEC shall also consider the cumulative impacts of the proposed facility.
3. The “Grounds for a finding of unreasonable adverse effect” and “Grounds for a finding of no unreasonable adverse effect” set forth in Section \*\*\* are neither exclusive nor dispositive; the SEC retains the ultimate judgment based on the balance of the evidence of whether or not a particular facility causes an unreasonable adverse effect on a resource.
4. **Resolving Adverse Impacts:**
  - a) The facility should be proposed and designed to avoid adverse effects on the resources identified in NH RSA 162-H:16, IV(c).
  - b) In cases where adverse impacts cannot be avoided, measures to minimize adverse effects identified in the SEC’s review of the facility may support a finding that such adverse effects are not unreasonable.
  - c) Where adverse impacts have been minimized as much as possible, in certain circumstances on-site mitigation measures or (where on-site mitigation measures are impractical or insufficient) off-site mitigation measures may support a finding that such adverse effects are not unreasonable. Mitigation measures must address the resource category adversely affected, reflect the best practical mitigation under the circumstances, and ensure resource benefits that exceed the adverse effects on the impacted resource.
5. **Monitoring and Adaptive Management:**
  - a) The SEC shall require, where necessary, as conditions of the certificate appropriate post-construction studies to 1) ensure compliance with required standards or 2) to evaluate and mitigate adverse impacts of a facility that cannot be reliably predicted prior to permitting (“adaptive management”). Such studies, if any, shall be conducted for a minimum of two years within the first five years of facility operation.
  - b) Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain; it is the preferred method of management in these cases. Where sufficient knowledge exists, actual implementation of a solution should not

be replaced by adaptive management. Adaptive management studies shall be designed in consultation with and approval of an adaptive management team established by the certificate, including representatives of appropriate state and federal agencies and at least one professional with pertinent expertise. Results and recommendations to mitigate impacts identified from such studies shall be provided to the SEC and members of the adaptive management team within three months of the end of each field season or year of operation as appropriate. Subsequent to completion of such studies, or sooner if serious impacts are identified, the adaptive management team shall meet with representatives of the facility owner/operator and at least one member of the SEC to review results and identify satisfactory mitigation strategies. Mitigation strategies so developed shall become amendments to the facility permit.

- c) The SEC shall require, where necessary, as a condition of the certificate an appropriate protocol for ongoing monitoring, documentation and reporting of wildlife mortality or injury by facility staff. Any observed mortality or injury event involving an individual of a significant wildlife species shall be reported to NH Fish and Game Department and the US Fish and Wildlife Service within 24 hours of discovery. Other wildlife mortalities shall be reported monthly to the New Hampshire Fish and Game by date, species, location, and circumstances. NH Fish and Game may require further study and/or adaptive management provisions based on observed mortality.

- 6. **Decommissioning.** The SEC shall require, where necessary, as a condition of certificate a decommissioning plan be submitted to and be approved. The plan must include, at a minimum, full funding for the removal of all components of the development, vegetative restoration of the developed area if it was built on previously undeveloped land, and maintenance of public safety and environmental protection during decommissioning. The SEC shall require the use of letters of credit, performance bonds, segregated funds, corporate parent guarantees and other forms of financial assurance to ensure that sufficient funds for decommissioning are available regardless of what point in the history of the development decommissioning becomes necessary and are sufficiently escrowed in case of bankruptcy. The anticipated salvage value of facility components or materials shall not be included in the determination of the decommissioning fund.

- 7. **Best Practical Mitigation.** An application for an energy development must contain, and the SEC shall require, best practical mitigation for all aspects of construction and operation of generating and transmission facilities. In determining best practical mitigation options, the SEC shall consider:

- a) The existing state of technology;
- b) The effectiveness of available technologies or methods for reducing impacts; and
- c) The economic feasibility of the type of mitigation under consideration.

**General Standards (Natural Environment)**

1. In determining whether an energy or transmission facility creates an unreasonable adverse effect on the natural environment, the SEC shall at a minimum consider the following resource areas: rare plants, rare and exemplary natural communities, steep and fragile soils, water and wetlands, and wildlife and wildlife habitat.

**General Standards (Aesthetics)**

1. In determining whether an energy facility creates an unreasonable adverse effect on aesthetics, the SEC shall at a minimum consider the visual impact to historic properties, settled areas such as town centers and residential areas, and relatively natural landscapes valued for their contribution to recreational activities (especially as viewed from Significant Scenic Viewpoints).
2. The SEC shall consider not only the effect of the facility in isolation but also its potential cumulative effect when combined with other existing or proposed energy facilities within at least 10 miles of the proposed facility. Assessment of cumulative effect may be based upon the combined, successive, or sequential observation of energy facilities by the viewer:
  - “Combined observation” means that a viewer sees multiple facilities from a stationary point within a typical cone of vision.
  - “Successive observation” means that a viewer sees multiple facilities from a particular viewpoint, but not within the same viewing arc (for example, the viewer would have to turn their head and/or body).
  - “Sequential observation” means a viewer sees multiple facilities from different viewpoints as the viewer travels along a route (for example, a hiking trail, river or on a lake).
3. The SEC shall consider not only direct daytime visibility of the facility but also the nighttime impact of facility lighting, including both direct visibility of facility lights and indirect visibility of atmospherically-reflected lighting.
4. In making a determination as to whether a facility creates an unreasonable adverse effect on aesthetics when seen from one or more Scenic Viewpoints, the SEC shall consider the Visual Impact Analysis, information submitted by intervenors and independent consultants, and public comment. The SEC shall base its decision on the potential impact to individual Viewpoints or the combined impacts to multiple Viewpoints.
5. A finding that an energy facility is a visible feature in the landscape, including from one or more Scenic Viewpoints, is not by itself a sufficient basis for a finding that the facility has an unreasonable adverse effect on aesthetics.

**THE FOLLOWING SHALL BE ADDED AS A NEW SECTION IN CHAPTER 300:****Grounds for findings****A. RARE PLANTS**

**Grounds for a finding of unreasonable adverse effect:** A population of a rare plant species is present in the project area and will be directly disturbed by project activity, and:

- a) The population that would be disturbed by project activity is notably larger or of higher quality than other known populations of the species, or
- b) The species is known from few if any other locations within the regional landscape.

**Grounds for a finding of no unreasonable adverse effect:**

- a) No rare plants will be disturbed by project activity, or
- b) A population of a rare plant species is present in the project area and will be directly disturbed by project activity, but:
  - The population is small or of low quality relative to other known populations of the species,
  - There are multiple other populations of the species within the regional landscape, or
  - The population has a low probability of long-term viability if left undisturbed.

**B. RARE AND EXEMPLARY NATURAL COMMUNITIES**

**Grounds for a finding of unreasonable adverse effect:** An occurrence of a rare or exemplary natural community is documented within the project area and will be directly impacted by project activity, and:

- a) The community that would be disturbed by project activity is notably larger or of higher quality than other known occurrences of the community, or
- b) The community is known from few if any other locations within the regional landscape.

**Grounds for a finding of no unreasonable adverse effect:**

- a) No rare or exemplary natural communities will be disturbed by project activity, or
- b) An occurrence of a rare or exemplary natural community is documented within the project area and will be directly impacted by project activity, but:
  - The community occurrence is small or of low quality relative to other known occurrences of the community,
  - There are multiple other occurrences of the community within the regional landscape, or
  - The occurrence has a low probability of long-term viability if left undisturbed.

### C. STEEP OR FRAGILE SOILS

**Grounds for a finding of unreasonable adverse effect:** Construction of the facility will create extensive disturbance of steep or fragile soils and/or involve significant terrain alteration and the creation of multiple large cut-and-fill areas, such that a significant risk of soil erosion is created.

**Grounds for a finding of no unreasonable adverse effect:** The NH Department of Environmental Services issues the required Alteration of Terrain permit with conditions sufficient to eliminate a significant risk of soil erosion.

### D. WATER AND WETLANDS

**Grounds for a finding of unreasonable adverse effect:** Facility involves impacts to wetlands, streams or other water resources that cannot be avoided, minimized, or mitigated through the conditions of permits issued by the New Hampshire Department of Environmental Services, U.S. Army Corps of Engineers permits and other state or federal agencies with jurisdiction over the facility because:

- Project activity would create a significant risk of degradation of water quality (including but not limited to turbidity, temperature, chemical parameters and biologic and aquatic community integrity) outside of the project area, or
- Project activity would significantly alter natural hydrologic regimes (i.e., quantity and timing of surface and subsurface flows) outside of the project area.

**Grounds for a finding of no unreasonable adverse effect:** The New Hampshire Department of Environmental Services, the U.S. Army Corps of Engineers and other state or federal agencies with jurisdiction over the facility issue required permits with conditions sufficient to minimize significant impacts to wetlands, water quality and hydrologic regimes and appropriate mitigation for wetland impacts.

### E. WILDLIFE AND WILDLIFE HABITAT

**Grounds for a finding of unreasonable adverse effect:**

- a) The presence of any significant wildlife species has been documented in the project area, and the facility would eliminate or significantly degrade primary habitat utilized by that species.
- b) The project area lies in whole or in part within an area classified as “Highest Ranked Habitat in New Hampshire” in the New Hampshire Wildlife Action Plan (or a similar ranking delineated in subsequent analyses or revisions of the Wildlife Action Plan), and the facility would significantly degrade the habitats or habitat conditions that are the primary contributors to this designation.
- c) The project area lies in whole or in part above 2700 feet in elevation, and the facility would eliminate or significantly degrade habitat utilized by species dependent on high-elevation habitat.

- d) Information suggest a high risk of mortality for migrating or resident aquatic species, animals, birds or bats as indicated by passage rates, flight elevations or species composition of migrants and residents during various weather or flow conditions, and the facility would create an unacceptable risk of mortality to migrating or resident aquatic organisms, animals, birds or bats that cannot be successfully mitigated through operational measures.
- e) The facility would create significant fragmentation of aquatic ecosystems or a block of mature interior forest habitat that is notable in the regional landscape for its size and/or quality.
- f) The facility is a wind energy facility and is located within one-half mile of a peregrine falcon or golden eagle aerie or active bald eagle nest, or within 1.5 miles of a known bat maternity/nursery colony or hibernaculum.
- g) The facility would 1) significantly alter aquatic and riparian habitat (including but not limited to quantity and timing of hydrologic flows, temperature or chemical composition, and the character of aquatic, littoral and riparian vegetation) to the detriment of native or sport species, 2) significantly restrict the passage of aquatic organisms through the project area, 3) create a significant risk of mortality to aquatic organisms passing through the project area.
- h) The facility's cumulative impact, in itself or in combination with other impacts, could represent an overall detrimental impact to a vulnerable wildlife resource.

**Grounds for a finding of no unreasonable adverse effect:**

- a) The facility would only disturb habitat that is common in the regional landscape or which has been significantly impacted by previous human activity.
- b) The facility would not directly impact the primary habitat(s) utilized by significant wildlife species observed in the project area.
- c) The facility would not fragment aquatic ecosystems or large blocks of mature interior forest habitat.
- d) Impacts to areas designated as Highest Ranked Habitat in New Hampshire would not affect the habitats or habitat conditions that are the primary contributors to this designation.

- F. **AESTHETICS** [*Note: This framework focuses on evaluation of impacts to recreational or scenic viewpoints (more or less natural areas, including the backdrop to historic places) but do not fully address the issues associated with evaluating energy facilities' aesthetic impacts on settled areas (such as town centers and residential areas).*]

**Grounds for a finding of unreasonable adverse effect:** The following factors shall be considered strong indicators that the facility will create a long term (greater than 5 years) unreasonable adverse effect on aesthetics when viewed from one or more Significant Scenic Viewpoints or Scenic Viewpoints:

- a) The Viewpoint(s) are deemed to be of high concern by the Visual Impact Analysis or SEC deliberations;
- b) The facility will be a dominant and/or strongly incongruous feature in a relatively naturally appearing landscape or setting for a historic property;

- c) The facility will adversely affect the coherence (unity) of the established patterns of the landscape and critical public views; and
- d) There is a high likelihood that the facility, considered in isolation or cumulatively in combination with the impacts of other existing or proposed facilities, will significantly reduce the public's aesthetic enjoyment of one or more Viewpoints.

**Grounds for a finding of no unreasonable adverse effect:**

- a) The facility is not a dominant feature on the landscape as seen from Significant Scenic or Scenic Viewpoints due to factors such as distance or intervening topography or vegetation.
- b) Only limited parts of the facility are visible from Significant Scenic or Scenic Viewpoints such that the facility is not a dominant feature on the landscape.
- c) The facility is seen only from Scenic Viewpoints of relatively low significance or low levels of public use,
- d) The facility is seen in the context of a landscape in which existing human development is already a prominent feature of the viewscape.

## **OTHER ISSUES**

The following issues are ones that we believe need to be addressed in the rule-making process but for which we have not formulated a specific framework for rules.

### **Noise**

Noise is a concern in any large-scale development and has emerged as a particular concern in wind energy facilities. It is our understanding that there are no statewide laws or regulations governing noise from the construction or operation of energy facilities. Rather, standards are applied on a case-by-case basis, often with deference to local ordinances.

We believe that the rules should include minimum statewide noise standards for energy developments (which may be superseded by more stringent local standards). The rules should include provisions that recognize and address the particular types of noise created by different types of facilities.

It is beyond our expertise to propose specific rules or standards for noise. However, we note that Maine has rules governing noise from large developments (those of sufficient size to trigger state-level permitting under the Site Location of Development law), which may help inform your development of rules in this area. These rules were developed by the Department of Environmental Protection and are contained in the Code of Maine Rules, Chapter 375 (No Adverse Environmental Effect Standard of the Site Location Law), Section 10 (Control of Noise)<sup>2</sup>. The rules include a section that specifically addresses noise from wind energy facilities.

### **Cumulative impacts**

We have included language requiring consideration of cumulative impacts of multiple facilities in our proposed rule framework related to impacts both to the natural environment and aesthetics. However, additional detail needs to be developed regarding how these impacts should be considered in the permitting of individual facilities and how the threshold for cumulative unreasonable adverse effect should be determined.

This is an important issue, as cumulative impacts can affect many types of resources. These include such things as the cumulative mortality to birds and bats caused by wind power development, the cumulative impact on the forest resource from biomass development, or the cumulative impact on aquatic habitat of hydropower development.

### **Alternatives**

We have not included draft language on the meaning of, and process for the SEC to consider, “available alternatives.” In general, we believe better defining the scope and content of the applicant’s and the SEC’s analyses of alternatives is extremely important.

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<sup>2</sup> <http://www.maine.gov/sos/cec/rules/06/096/096c375.doc>.

Although the SEC has historically understood available alternatives to be focused on alternative sites considered by the developer and/or alternatives that are within the developer's immediate ability to implement, this is not necessarily an acceptable approach. The SEC's consideration of available alternatives, including those beyond the developer's control, must inform its review of a facility's environmental and other impacts, including what constitutes an unreasonable adverse effect.

### **Municipal views**

The statute requires that the SEC give "due consideration to views of municipal and regional planning commissions and municipal governing bodies" in assessing whether the proposal will or will not "unduly interfere with orderly development of the region." In reviewing applications for certificates, the SEC has both this specific statutory mandate and also a broader, prudential obligation to consider and weigh the views of municipal and regional authorities, especially those with special expertise or jurisdiction in land use planning, economic, environmental, and/or energy issues, and those comprised of elected officials. This obligation includes consideration of the views of municipal authorities in any towns and cities that are affected by the proposed facility, not just those of the facility's host town(s).

At a minimum, the SEC must consider all applicable local master plans, regional land use and economic development plans, and any positions or comments offered by any municipal board, committee, or body. In its decision on an application, the SEC must address the consistency of the proposal with these plans and positions.

For each application, the governing bodies of the affected towns and cities should be encouraged to appoint a joint "community advisory committee" comprised of community members. Notwithstanding any municipal body's intervention in an SEC proceeding, such a committee would be charged with (i) reviewing the application, all related filings and materials provided by any party, and evidence introduced in the SEC proceeding, (ii) soliciting, collecting, and summarizing community sentiments regarding the proposal, and (iii) preparing and delivering to the SEC one or more reports regarding the committee's and the communities' views regarding the application. Without prejudice to the views of parties to the proceeding or to other public comments, the SEC may accord significant weight to the reports of a community advisory committee.

Statutory changes may also be appropriate to strengthen, clarify, and/or formalize municipal involvement in the SEC process, such as clarification that municipal views on any aspect of the application must be considered and institutionalization of community advisory committees.

### **Competing Land Uses**

Located in a small state in a crowded region, New Hampshire's natural landscape must support myriad uses, including the production of forest products, serving as a primary destination for outdoor recreation, and providing ecosystem services like clean air and

water, biodiversity, and carbon storage. To avoid or minimize conflicts between energy generation and transmission and these other economically and socially important uses, the SEC process should include a review of how a proposed facility balances access to, and use of, the land surrounding the facility for other, often pre-existing, uses. The point of adding this element to the process is not to mandate a particular access arrangement, but to ensure that managing access to enable multiple uses and minimize conflicts has been thought through and, where needed, negotiated as part of the facility development process. Asking applicants to demonstrate that they have worked with other users to develop a plan for balancing multiple uses on a particular site falls under RSA 162-H's requirement that a facility does not unduly interfere with the "orderly development" of the region.