SB 99 Pre-rulemaking Process – Natural Environment Working Group
Comments on Initial Working Document
April 29, 2014

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I. Introduction

This is an initial set of general comments on the *Initial Working Document* that Carol Foss circulated on April 25, 2014. As Carol stated in her email from April 25th, the draft she has circulated is one based on input from environmental NGOs with input from NH Fish & Game and U.S. Fish & Wildlife, and this is our first opportunity to engage with others on the proposed concepts. Our work group had a productive meeting on April 28th, and many of the questions and comments are captured in the annotated comments on the *Initial Working Document* that were added during the meeting. Those comments do not cover all of the questions and concerns on the initial draft, however, so I provide some additional ones below.

This process is unfolding very fast, and it is still not clear what the working group is being asked to produce. It appears that the work groups were initially asked to identify priorities and suggestions, but it also appears that we now are already embarking on an effort to write suggested SEC rules. Either way, this is a substantial undertaking; it should not be rushed. The quality of the product and the prospects of achieving consensus on issues will be enhanced with sufficient time for consideration and deliberation by the work group.

It is important that the working group determine at the outset the goals that we are trying to meet. For example, are there any material deficiencies in the current SEC process regarding specific natural resources issues? Most observers, I believe, think that the issues have been addressed effectively. While there is always room for improvement in the process, there do not appear to be such substantial deficiencies that major rulemaking by the SEC is needed. As suggested in OEP's approach to this process, we should be focused on priority matters.

Because the work group was presented at the outset with an already-drafted initial set of proposed new rules, the group has taken no time to consider what those priority issues may be. We should only be working on material demonstrated problems in the current siting process. If, and to the extent that, any such priority issues are identified, the work group should focus on the specific points identified and narrowly tailor its recommendations to address them.

Further, the working group should first focus on the lessons learned from prior SEC projects. Time did not allow much discussion at the April 28 meeting on how certain of the issues included in the *Initial Working Document* are already addressed well in current SEC practice.

In the work of all the work groups it is important to remember that we are ultimately proposing ideas for rulemaking by the SEC. Not all participants in this process have in depth experience with state administrative rules and their legal, regulatory significance. As our work group considers the ideas in the *Initial Working Document* and other ideas and concepts that will be presented and discussed, it is imperative that we consider the binding nature of anything that would be recommended to the SEC as formal rules. There are many practical ideas underlying *Initial Working Document* that most of us can agree with; converting those to a regulatory requirement is difficult, if not unwise.

II. Specific Comments

A. Definitions: Several new regulatory concepts are introduced in the initial draft, most notably on "cumulative impact", "adaptive management", and "best practical mitigation". Each of these definitions and the suggested regulatory framework for each concept will require careful consideration and careful drafting by the work group if any are to be recommended to the SEC for formal rulemaking. The question ultimately to be decided is the extent to which we as a work group should recommend new rules to help the SEC determine what might be "unreasonable adverse impacts" to natural resources. We need to be mindful of new concepts that may exceed the SEC's statutory authority; *e.g.*, "cumulative impacts" and a new regulatory entity called the "adaptive management team."

B. Application Requirements: Consultation by applicants with regulatory agencies always occurs; it is very much an important step, but it does not require rulemaking. If this were to be recommended as a rule to the SEC, the wording will need to be clarified to satisfy the administrative rules manual and to avoid unintended regulatory issues. Still, the work group should consider what deficiency under the current process needs to be "corrected' by new rulemaking.

C. Wildlife Studies for All Energy Projects: The suggested requirement that applicants shall follow protocols from state and federal agencies reflects in large measure the way applicants deal with regulatory agencies today. But, the specific provisions suggested in the *Initial Working Document* raise significant legal concerns and unintended regulatory consequences. (This is in addition to the practical reality that protocols have not been developed for many species.) The SEC should not delegate to any agency -- state or federal -- far-ranging, unlimited authority to set any regulatory thresholds. Moreover, the SEC cannot adopt a rule that would, in essence, incorporate by reference another agency's (including federal agencies not members of the SEC) protocols (existing or to be developed), that are essentially guidelines and not required by law.

D. General Standards:

1. As noted in the annotated comment from the work group, the term "in combination" is not defined and its regulatory meaning is unexplained.

2. This addresses the suggested operative requirement that cumulative impacts be assessed. How this new concept would be fleshed out and implemented by the SEC raises many practical and legal questions. Nowhere in RSA Ch. 162-H is the SEC authorized to consider cumulative impacts. And, even assuming that there were such authority, the SEC should not consider so broad a regulatory reach that singles out only energy projects.

3. This draft section would apply various standards for the required avoidance of impacts, minimization of and mitigation for unavoidable impacts. Of particular concern here is that the work group avoid creating a brand new regulatory scheme, and rather, use tested concepts from other regulatory programs. The terms "minimized as much as possible" and "best practical mitigation", for example, are terms not found in other NH programs and should not be used.

4. This draft section addresses the concept of "adaptive management". The concept is good; and it is routinely used by the SEC in setting conditions in its approval documents that require ongoing monitoring and possible mitigation steps. This authority already exists, so we should consider whether this is a high priority rulemaking matter to suggest to the SEC. We also need to give careful consideration to the somewhat elaborate regulatory scheme envisioned by the creation of an "adaptive management team" that would have broad authority independent of the SEC itself. This is another idea that may work effectively as an option for most projects. But it may not be appropriate as a rule that is binding in a particular way in all cases.

5. We did not discuss decommissioning at our meeting yesterday. I mentioned it briefly and I sensed around the table a belief that this is not an issue for our work group. Let me add, too, that this is another idea that may make sense for one kind of energy project but not another.

6. As noted earlier, I believe that the term "best practical mitigation" does not work. The aspects listed in subsections (a)-(c) are helpful, but the work group needs to give considerable thought to how, if at all, this should be addressed in SEC rules.

E. Siting Criteria -- Wildlife and Wildlife Habitat: At the April 28 meeting, we only briefly touched on the last section of the *Initial Working Document*. I mentioned briefly my concern that as drafted the proposed concept would put the Fish & Game Department in a position of determining on its own very important decisional issues. Subsection (a) asks Fish & Game to determine what "primary habitat" could not be impacted at all by an energy facility. Subsection (b), in turn, would authorize Fish & Game to deny approval of an energy facility if it determined that there were an unreasonable adverse effect on "one or more significant wildlife species," or if the facility would "significantly conflict with the goals and policies of the NH Wildlife Action Plan." Carol asked if I would take a crack at drafting some language to address the questions I raised about this language. I will give that further thought, but my initial thinking is that there really should not be a separate regulatory scheme created in the SEC rules that would give independent authority to one state agency (and one that may no longer be a member of the SEC) and

that would impose a zero impact standard for any energy facility. I assume that this approach is not exactly what was intended and, in my view, the work group should be wary of recommending that the SEC codify this in its rules.