EOLIAN
RENEWABLE ENERGY

April 29th, 2014

David Publicover
Peter Silbermann
Via email

RE: SB 99 – SEC Rulemaking Process - Aesthetics

Mr. Publicover and Mr. Silbermann,

Eolian Renewable Energy, LLC hereby submits the following comments for consideration by the working group and the NH Office of Energy and Planning with respect to the proposed standards concerning aesthetics in the SB 99 rulemaking process. As an initial matter, Eolian is very concerned that the structure of the working group is inappropriate for a state rule making process. We recognize and respect that many diverse interests are entitled to participate in this process, but we maintain that the only fair way to get a reasonable approach to establishing a standard for aesthetics or any other criteria subject to this rulemaking process is to have independent leadership of the working group process, which is not the case here. While the tone of yesterday's conference call was largely respectful and it was reasonably moderated, the draft circulated by the leadership of the working group would ultimately prevent any wind energy facilities from being sited in New Hampshire, and no previously sited wind energy facility could have met the criteria set forth in the draft. This is an unacceptable starting point when the drafters of that proposal will ultimately submit their recommendations to the larger stakeholder group while comments from other parties with a significant interest are relegated to sidebar comments.

Specific comments:

- Definitions:
  - Cumulative Impact
    - I agree with attorney Needleman's comment, that requiring VIA's to address cumulative impacts is beyond the authority granted in the statute.
    - Current practice of the SEC is to evaluate proposed energy facilities in the context of other developments.
  - Proposed Development (this definition becomes unnecessary per the comment on cumulative impacts above)
    - This definition is excessively broad and could include basic precursors to an energy facility such as meteorological equipment applied for under a local ordinance.
    - In the event that two or more projects apply for a Certificate within a similar timeframe, this definition creates additional problems, because a project that files two weeks before an applicant intends to file, may not be known to the applicant.
    - If two applicants file in close proximity to one another and each is required to account for the aesthetic impacts of the other and one is denied on the basis of the cumulative aesthetic impacts of the other proposed development, yet that development is never constructed, it creates inequity.
  - Scenic Viewpoint
    - This definition is essentially all encompassing. It also contains numerous other terms within it that are undefined and thus ripe for litigation, such as "generally natural landscape", "immediate vicinity", and "focal point for aesthetic enjoyment".
    - The premise of the definition is that all public views should start with the presumption that they are scenic and require an applicant to bear the burden of disproving the presumption. Including "Great Ponds" is just one such example. Great Ponds are given no scenic significance in any legislation in New Hampshire. In fact the definition of a

Great Pond in New Hampshire requires only that the pond be 10 acres or larger, and more than 700 such water bodies meet this definition – again with no basis for attributing any scenic significance to them. This is just one example of a larger problem with this definition.

- There is not correlation between "historic" and "scenic". Including property that "has been listed or is eligible for listing in the state or national register of historic places" would require any applicant to go through an onerous and unreasonable process of determining "eligibility" for any structures within 10 miles of its facilities with no established process for determining such eligibility. Applicants are already required to go through the Section 106 process that addresses property that is eligible for listing.

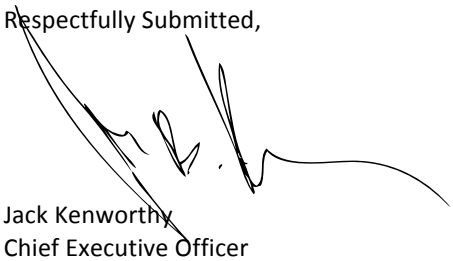
- Significant Visual Impact
  - There is no definition of the term "public view"
  - The proposed definition attempts to introduce a subjective interpretation as a criteria.

- Application Requirements:
  - Bullet 2:
    - we do not object to a standard of 10 miles *from any wind turbine*, but the standard should clearly define that other, less visible elements of a facility should not be subject to a 10 mile analysis, such as road improvements distant from the core project area, or transmission upgrade distant to the core project that do not cause substantial visual impacts.
    - The standard should be 10 miles, and not *at least 10 miles.*
    - There is no basis for a VIA to address visual impacts out to 15 miles if turbines are taller than 500 feet. During the pendency of a proceeding, if exceptional circumstances exist, the SEC has the ability to require additional information if it is deemed necessary.
  - Bullet 6:
    - This is an unprecedented requirement that does not have direct bearing on the visual impacts of a proposed facility.
    - Requiring an applicant to "describe all existing or proposed energy facilities within 10 miles" is unreasonable and may require information not available to an applicant.
    - This appears to add an additional 10-mile (e.g. a radius totaling 20 miles) evaluation, since it requires identification of any energy facilities within 10 miles *of any portion of the visual analysis zone*, which already extends 10 miles from the proposed facility. This in effect would require any applicant to identify and describe all energy facilities within a more than **40-mile** diameter polygon from its proposed facility.
  - Bullet 7:
    - Requiring an applicant to "reference and describe any plan, analysis, report or other publically available document" that describes the scenic values of the visual analysis area (undefined) is entirely unreasonable and will likely result in all applications being deemed incomplete.
  - Bullet 8:
    - This requirement contains multiple undefined terms such as: "cultural features" and "concentrations of residences"
  - Bullet 9-C:
    - Evaluating the impact of a facility based on its "scale…relative to surrounding topography" is undefined and ambiguous. How is the scale of surrounding topography defined? Is a 300 foot emissions stack at sea level with generally flat surrounding topography more or less of an impact that a 400 ft wind turbine on a 1800 foot hill?
  - Bullet 10-G:
    - Requiring a "simulated video flyover" is an onerous and unreasonable requirement and the definition of what is required is unclear.
  - Bullet 10-H:

        - The requirements should not be different for applicants whose consultants have prepared visual simulations of the same type as the proposed facility and those that have not.
        - Applicants may or may not have the ability to access facilities owned by others that have been constructed and are in operation.
    - Bullet 11:
        - The SEC may already require additional information from any applicant if it deems it necessary. Identifying a single element that the SEC can require is unnecessary.
    - Bullet 12:
        - Aside from the structural problems with allowing the SEC to "waive requirements", which is unlikely to be practically or legally allowable, limiting their ability to only waive requirements for "concentrated industrial energy generation facilities" is biased.
- Siting Criteria
    - Criteria 1 (a) makes a local written standard a dispositive requirement for the siting of energy facilities, which is contrary to the intent of 162:H
    - Criteria 1 (b) contains additional terms that are not defined and hence adds additional subjectivity to the determination the committee must make. By virtue of the overly broad definition of "Scenic Resources", this could lead to every wind energy facility being denied a permit.
    - Criteria 2 creates a requirement to employ a technology that is not currently commercially available and precludes the employment of some other technology, perhaps equally or more effective at minimizing night-time lighting, even if the radar activated lighting systems do become commercially available. This standard is also redundant with criteria 1 (c).

Finally, I have offered specific comments in places regarding particular concepts or terms while not necessarily agreeing that those concepts or terms are even necessary or helpful. For the record, I believe it is important to point out the extent of the problems with this draft. Attorney Barry Needleman has offered comments about the general approach to the criteria that I support and have attached to my comments.

Respectfully Submitted,



Jack Kenworthy
Chief Executive Officer

CC: Meredith Hatfield, Director, NH Office of Energy and Planning

SB99 Pre-rulemaking - Aesthetics Criteria Working Group

Comments to Draft Siting Criteria for Aesthetics
April 30, 2014

General Comments

Any effort to draft a set of recommendations for aesthetic criteria has to start with a few key concepts in mind:

The criteria must not exceed the authority granted by the statute. The focus here, as defined by the statute, is for the SEC to make determinations about unreasonable adverse effects on aesthetics. That is the threshold and key question. Going beyond that is not necessary or consistent with statutory authority.

The SEC already has experience making these determinations. While most participants agree this aspect of the process can be improved, a lot about it has already worked well in practice. New criteria should target the specific areas that need improvement.

Criteria should not compel specific outcomes. The point of this exercise has got to be better defining the Visual Impact Assessment (VIA) process in order to ultimately allow the SEC to make determinations about unreasonable adverse impacts based on specific facts, the criteria and prior precedent.

There are good examples from other jurisdictions of how to undertake a VIA. Those should be drawn upon as appropriate so this rulemaking process does not have to re-invent the wheel.

With respect to many types of projects, such as gas pipelines, electric transmission lines, a biomass plant, etc, many aspects of the current proposal really don't fit and that will need to be accounted for.

Finally, my comments here are very preliminary. I tried to keep them very high level recognizing that this proposal is only a first iteration and does not yet reflect input from a broad group of constituencies.

Specific Comments

Definitions

1. As proposed, the definitions are too narrow. Any list of definitions will likely have to be more broad so it can better assist in the preparation of an objective VIA. However, that process should come later after the required elements of a VIA are better fleshed out.

2. Some definitions don't really work as proposed. For example, cumulative impacts should not be an element of a VIA. That is beyond the authority granted in the statute. The proposed definition of scenic viewpoint is too broad and will need work.

3. "Significant visual impact" as a defined term will create significant confusion and is likely unnecessary. As noted, the focus here is on "unreasonable adverse effect" on aesthetics and the process for helping the SEC to make that determination.

Application Requirements

1. This section really does not need much detail. In fact, it could stop after the first bullet and just let the experts do their job. If the VIA is lacking in any way the SEC deems significant, it can ask for more analysis or ultimately deny the application. The issue to date has not centered on the adequacy of VIAs – it has centered on determining what constitutes an unreasonable adverse impact on aesthetics. Notwithstanding that point, I offer a few other selected comments below.

2. Concepts associated with the "visual analysis zone" will need refinement. The SEC has already been using 10 miles for wind projects. That generally makes sense. Going to 15 miles has never been necessary. In addition, more thought needs to be given to this issue on the basis of the specific type of project. While 10 miles may make sense for wind, it is not necessary for other types of projects – biomass and gas plants, transmission lines, gas pipelines, etc.

3. The initial draft does not require that the applicant explain how the project was developed; how the applicant dealt with visual issues; what alternatives were considered; etc. There is no mention of mitigation measures that can be used to offset visual impacts.

4. Requiring GIS analysis may be overkill; the professional preparing the VIA should be able to use the most appropriate tools to provide the viewshed analysis. Tree heights of 40' are typically used; however, provisions will be needed to allow the VIA to determine actual tree heights and use that number in the assessment.

5. Number 8 is too broad. The viewshed mapping will provide this data. Moreover, the inclusion of 'individual residences' is not appropriate; standard practice is to limit analysis to public viewpoints or lands to which the public has access.

6. Number 9 also is too broad as currently proposed.

a. The concepts of 'characteristic landscape' and "Key Observation Points (KOPs) need to be brought into the discussion so the VIA process itself does not become unwieldy or unreasonable.
b. There is no way under this methodology to determine what is considered 'minimal', 'moderate', or 'significant'. Thresholds or some other way of evaluating the impact are necessary.

7. Item 10 is also too broad and contains requirements that are unnecessary or are not typically required in a VIA (g, for example) Page: 3

a. For (a), again, the concept of characteristic views should be discussed: i.e., using typical views or KOP's to represent a common class or type of view.
b. Under (c), the VIA should include a narrative and photo simulations to illustrate mitigation measures that have been considered and/or will be incorporated into the project to offset significant visual impacts.
c. There must be a reasonable limit on the number of photo simulations required. Certainly not from every viewpoint identified.

Siting Criteria

1. 1(a) is not workable and contrary to the siting statute. Likewise, 1(b) and (c) are too broad. The issue under the statute is unreasonable adverse effect on aesthetics. Any criteria that may be employed need to stick to the statutory standard and not impermissibly expand it.

2. Concepts like painting, etc. relate to mitigation. They are a case-by-case issue best left to the evidence in each case and the SEC's judgment.