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NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1500
P: (518) 402-9185 | F: (518) 402-9018
www.dec.ny.gov

March 29, 2019

Via Electronic Mail

Secretary Kathleen H. Burgess
Department of Public Service
Three Empire State Plaza
Albany, NY 12223
secretary@dps.ny.gov

Sean Mullany, Administrative Law Judge
Office of Hearings and Alternative Dispute Resolution
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350
Sean.Mullany@dps.ny.gov

Daniel O'Connell, Administrative Law Judge
Office of Hearings and Mediation Services
New York State Department of Environmental Conservation
625 Broadway, First Floor
Albany, NY 12233-1550
Daniel.Oconnell@dec.ny.gov

Re: Case No. 16-F-0559: Application of Bluestone Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sanford, Broome County

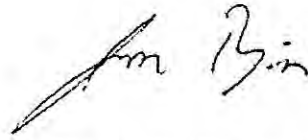
Dear Secretary Burgess and Examiners Mullany and O'Connell:

On behalf of the New York State Department of Environmental Conservation (DEC), enclosed please find DEC's Statement of Issues for Litigation in the above-referenced proceeding. DEC remains actively engaged in settlement negotiations with the Applicant and other parties. Depending on the outcome of those discussions, it is possible that some or all of DEC's Issues for Litigation will be eliminated or narrowed.



Department of
Environmental
Conservation

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Bin". The signature is written in a cursive, somewhat stylized font.

Jonathan A. Binder, Esq.

Encl.

cc: Active Party List
DEC Review Team

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Case No. 16-F-0559: Application of Bluestone Wind, LLC for a Certificate of
Environmental Compatibility and Public Need Pursuant to Article
10 for Construction of the Bluestone Wind Farm Project Located in
the Towns of Windsor and Sanford, Broome County

DEC STATEMENT OF ISSUES FOR LITIGATION

Jonathan A. Binder, Esq.
Office of General Counsel
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12223-1350
(518) 402-9188

Dated: March 29, 2019
Albany, New York

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Case No. 16-F-0559: Application of Bluestone Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sanford, Broome County

DEC STATEMENT OF ISSUES FOR LITIGATION

Introduction

Pursuant to the Examiners' *Ruling on Procedural Schedule*, issued March 7, 2019, the New York State Department of Environmental Conservation (DEC) submits this Statement of Issues for Litigation concerning the Application of Bluestone Wind, LLC (Applicant) for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sanford, Broome County (Project). DEC may eliminate or narrow issues depending on the outcome of ongoing settlement negotiations with the Applicant and other parties. DEC also reserves the right to supplement this list with additional items, if other relevant issues are identified or if it is necessary to develop an adequate record to support a decision under Article 10 of the Public Service Law (PSL).

Article 10 of the PSL requires the Applicant to demonstrate compliance with all applicable State and local regulations. PSL §162(1). Furthermore, Article 10 of the PSL requires the Board to make certain findings and determinations regarding a proposed facility prior to issuing any Certificate, including regarding the environmental impacts of the construction and operation of the proposed facility, and that the proposed facility is designed to operate in compliance with applicable State laws and regulations concerning the environment. PSL § 168(2) and (3).

As it relates to the Project, certain environmental statutes and regulations apply as to which DEC has original jurisdiction for the purpose of examining whether the Project should be authorized by the Board (as defined in PSL §160(4)). Specifically, the Applicant must demonstrate compliance with the following statutory and regulatory provisions with regard to the construction and operation of the Project: (i) Article 11 of the Environmental Conservation Law (ECL) and Title 6 of the New York Code, Rules and Regulations (6 NYCRR) Part 182 with respect to listed species; (ii) Article 15 of the ECL and 6 NYCRR Part 608 with respect to stream disturbances and water quality; (iii) Article 24 of the ECL and 6 NYCRR Parts 663 and 664 with respect to disturbances of regulated freshwater wetlands and their adjacent areas; and (iv) Article 9 of the ECL with respect to invasive species. In addition, construction and operation of the Project has the potential to result in other environmental impacts. Therefore, DEC proposes the following issues for litigation in this proceeding.

PSL Article 10 Issues

1. Listed Species:

DEC Regulatory Authority: ECL Article 11 and 6 NYCRR Part 182

The Applicant contends that the Project will result in the take of State/federal threatened or endangered species, including Northern Long-Eared bats (NLEB), Bald Eagles, and Golden Eagles. The Applicant proposes avoidance and minimization measures for these species, which could include seasonal tree clearing windows and curtailment. For unavoidable impacts, the Applicant proposes a Net Conservation Benefit Plan, which must result in a net conservation benefit to the species. DEC continues to work with the Applicant to determine whether it meets regulatory standards for the proposed take of the listed species from the construction and operation of the Project. This may include implementation of additional avoidance and minimization measures, as well as the development of a Net Conservation Benefit package that is approvable by DEC and in compliance with the requirements of ECL Article 11 and 6 NYCRR Part 182.

2. Streams:

DEC Regulatory Authority: ECL Article 15 and 6 NYCRR Part 608

The Article 10 application that was submitted and filed by the Applicant on September 18, 2018, states that there are several protected streams within the Facility area including one Class A stream (best use for drinking water), one Class B(t) (best use for primary and secondary contact recreation), and several Class C streams designated with a NYSDEC Standard of (t) indicating they support trout. These streams include Fly Creek, Marsh Creek & tributaries, Oquaga Creek Upper & tributaries, Bone Creek, and Big Hollow Brook tributaries. After the filing of the Article 10 application, DEC staff determined that Oquaga Creek constitutes navigable waters of the State. Therefore, the wetlands adjacent to and contiguous to Oquaga Creek, that are inundated at mean high water level, are also regulated under 6 NYCRR Part 608.

The Applicant must confirm the totality of the stream and associated wetland disturbances with DEC, and then demonstrate compliance with regulatory standards for avoiding and/or controlling stream disturbances and protecting water quality, including standards such as those concerning turbidity and narrative standards that establish best usages. This will include consideration of appropriate stream crossing methods to minimize impacts, including evaluation of the use of horizontal directional drilling (HDD). DEC will continue to evaluate the proposed impacts to streams and work with the Applicant to avoid and minimize impacts to the maximum extent practicable.

3. Wetlands:

DEC Regulatory Authority: ECL Article 24 and 6 NYCRR Parts 663 and 664, and 6 NYCRR Part 608.9 (Water Quality Certifications)

The Applicant states that a total of 4.71 acres of wetlands will be impacted by the project, including 3.61 acres of temporary impact, 0.42 acres of permanent impact, and 0.68 acres of permanent forested wetland conversion. The Applicant states that there will be no impacts to State wetlands regulated under ECL Article 24 and 6 NYCRR Parts 663 and 664. DEC concurs with this assessment based on the currently known proposed layout of the Project. The Applicant states

that impacts to wetlands will be avoided and minimized to the maximum extent practicable. DEC will continue to evaluate the proposed impacts to wetlands and work with the Applicant to avoid and minimize impacts to the maximum extent practicable. For impacts that are not avoided or minimized, the Applicant will need to implement a Wetland Mitigation Plan package that is approvable by DEC.

4. Invasive Species:

DEC Regulatory Authority: ECL Article 9 and 6 NYCRR Part 575

The Article 10 application that was submitted and filed by the Applicant on September 18, 2018 included an Invasive Species Control Plan (ISCP). DEC will continue to evaluate the measures proposed by the Applicant to avoid and minimize the spread of invasive species (including those listed in 6 NYCRR Part 575) during construction, operation and maintenance activities. DEC will continue to work with the Applicant to avoid and minimize impacts to the maximum extent practicable. The Applicant will need to implement a final ISCP package that is approvable by DEC.

5. Other Issues:

The Applicant states there are several locations where buried collection lines will be installed along and across steep slopes, including where slopes are greater than 25 percent and a few locations where slopes exceed 35 percent. The Applicant states it will take measures to avoid and minimize siltation, including developing and implementing a Stormwater Pollution Prevention Plan ("SWPPP"). DEC will evaluate the proposed measures for construction on steep slopes and will work with the Applicant to ensure it is avoiding and minimizing construction on steep slopes to the maximum extent practicable.

The Applicant proposes certain Facility components on 480-a Forest Tax Law parcels, which will potentially result in landowners losing their 480-a status if such placement violates the 480-a management plans for the parcels. DEC will evaluate the activities proposed on 480-a parcels and work with the Applicant to ensure they are avoiding work on 480-a properties to the maximum extent practicable, and that the Applicant is notifying landowners of their potential risk in terms of penalties or losses.

Conclusion

DEC's review of the application and submission of testimony concerning the above-referenced issues provides an independent assessment that can serve to only enhance the record for the Siting Board and should properly be added to the list of issues for litigation in this proceeding. Moreover, the resolution of these issues is necessary for the Board to make the findings and determinations required by PSL Article 10. As stated above, DEC reserves the right to identify additional issues necessary for litigation, and to eliminate or narrow any issues that are resolved without the need for litigation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jon Binder". The signature is written in a cursive style with a long, sweeping underline.

Jonathan A. Binder, Esq.
Chief, Bureau of Energy and Climate
Change
Office of General Counsel
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12223-1350
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Jonathan.Binder@dec.ny.gov

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