STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

Petition of BNE Energy Inc. for a Declaratory Ruling for the Location, Construction and Operation of a 3.2 MW Wind Renewable Generating Project on New Haven Road in Prospect, Connecticut ("Wind Prospect")	**Petition No. 980**
	May 2, 2011

FAIRWINDCT, INC.'S POST-HEARING BRIEF

Pursuant to the Council's invitation to the parties and intervenors to submit briefs and findings of fact by May 2, 2011, FairwindCT, Inc. ("FairwindCT") hereby submits this post-hearing brief regarding the petition for declaratory ruling filed by BNE Energy Inc. ("BNE") on November 17, 2011.

In sum, FWCT submits 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 and applicable noise regulations. 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.

BACKGROUND

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

BNE submitted its petition on November 17, 2010, seeking a declaratory ruling that no certificate of compatibility and public need is necessary for its proposed construction of a 3.2MW industrial wind turbine project in residential Prospect, Connecticut. In support of and as part of its petition, BNE submitted 14 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 issues its decision on BNE's petition for declaratory ruling by May 16, 2011, in accordance with General Statutes § 4-176(i).

In its petition, BNE seeks approval to site two GE 1.6 MW turbines with a hub height of 100 meters on the property at 178 New Haven Road in Prospect. 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 the two turbines in its petition, but during the course of this proceeding also proposed an "alternate" location for the northernmost turbine that would move that turbine approximately 160 feet from its originally proposed location.

On February 8, 2011, BNE submitted a shadow flicker report attached to interrogatory responses, thereby apparently revising its visual resources evaluation submitted as Exhibit J to the petition. That report purported to assume that BNE was seeking approval for 100-meter blades. In supplemental testimony and at the March 31, hearing, Mr. Libertine testified that due to a "typographical error," that report was in fact based on the 82.5-meter blades. (M. Libertine

Supp. Pre-Filed Testimony, pages 3-4; 3/31/11 Tr. 226:17-228:5.) Therefore, no shadow flicker report was submitted for the 100-meter blades using the original proposed turbine locations.

On February 16, 2011, approximately halfway into the 180-day statutory time limit imposed by Section 4-176(i), BNE submitted revised site plans (thereby apparently revising Exhibit F to its petition) attached to the pre-filed testimony of Thomas Koning. Those site plans were completed by BNE and its consultants prior to January 31, 2011, but not provided to the parties and intervenors until more than two weeks later.

Also on February 16, 2011, BNE submitted an ice throw report attached to the prefiled testimony of Pierre Heraud, thereby apparently revising its petition again. That report assumed that BNE was seeking approval for 100-meter blades. No ice throw report was submitted for the 82.5-meter blades, although BNE has referenced an alleged reduced ice throw distance in response to interrogatories from the Council. (See BNE Responses to Council's Fourth Set of Interrogatories, dated Mar. 8, 2011.) Nor did BNE submit supplemental prefiled testimony or reports regarding the impact of the proposed "alternate" turbine location on the ice throw analysis for either blade length.

Also on February 16, 2011, BNE submitted its "final" bat acoustic report attached to the prefiled testimony of David Tidhar. That report apparently was intended to replace the "interim" report submitted by BNE as Exhibit L to its petition. (See Prefiled Testimony of David Tidhar, dated Feb. 16, 2011, Answer 3 ("Due to the fact that West was continuing to collect data concerning bat activity on the property, Exhibit L to the petition is a preliminary report. Our final bat acoustic report is attached hereto as Exhibit 2.").)

On March 8, 2011, BNE for the first time provided information to the Council and the parties and intervenors regarding the visual impact of 82.5-meter blades. (See Supp. Pre-field Testimony of M. Libertine, dated Mar. 8, 2011; BNE Responses to Council's Fourth Set of Interrogatories, dated Mar. 8, 2011.) This information effectively revised the visual resource evaluation report attached as Exhibit J to BNE's petition. Mr. Libertine also submitted prefiled testimony purporting to supplement his original shadow flicker report with information for the 82.5-meter and 100-meter blades at the "alternate" turbine location. (M. Libertine Supp. Pre-Filed Testimony, pages 3-4.) BNE did not submit a full shadow flicker report regarding the "alternate" turbine location.

Also on March 8, 2011, BNE submitted "revised" site plans yet again, attached to supplemental testimony of Mr. Cline. This time, BNE submitted an entirely new set of site plans, which appeared to replace Exhibit F to its petition, as well as 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 moving one turbine approximately 160 feet from its originally proposed location and significant changes to the engineering features and proposed road. Although Mr. Cline's sworn testimony indicates that these plans are revisions to the original petition, Carrie Larson, attorney for BNE, stated a week later that these plans "were not a substitution for the plans that were already filed . . . We're putting it in front of the Council as an alternative to the layout that was originally proposed . . . It's not a withdrawal of the original layout of this site and a replacement." (Hearing Tr. 3/15/11, 68:15-22; see also id. 69:11-17, 70:2-5 (Ms. Larson informing the Council that BNE has "submitted a revised set of plans as an alternative layout" and "is willing to go forward with the petition as filed").)

At 4:40 p.m. on March 28, 2011, after the Council office had closed for the day and approximately 72 hours before the evidentiary hearing in this matter is scheduled to close, BNE again submitted "revised" site plans, attached to the supplemental prefiled testimony of Melvin Cline.[1] This time, BNE claims that the new plans revise the plans submitted on March 8. Again, Mr. Cline's supplemental prefiled testimony indicates that these are revisions to the original site plans filed by BNE with its petition.

On March 28, 2011, BNE submitted a "response" to the letter from Frederick Riese, a DEP analyst, providing the DEP's comments about the proposed project. In that response, FairwindCT and the other parties and intervenors learned for the first time that BNE plans to "[p]erform a migratory bird study on the Site from March to April 2011, [and] additional bat monitoring from May to Oct 2011." No details are provided regarding these "additional" studies. The "additional bat monitoring" apparently will not even begin before the close of this evidentiary hearing and certainly will not be completed by the time the Council has announced it will render its decision. The "migratory bird study" presumably has already begun, but will not be completed by the close of the evidentiary hearing in this matter and may not be in final form before the Council must render its decision on this petition.

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

In short, the petition filed by BNE in November 2010 has been significantly revised in the past several months. It has been significantly revised since the Council issued its notices of

[1] In fact, the parties and intervenors did not receive the new site plans or other exhibits attached to Mr. Cline's supplemental testimony, because BNE again refused to serve such plans electronically. FairwindCT received the new plans and other exhibits by hard copy, in violation of its previously noticed method of service, on March 29, 2011 – two days before the finally hearing in this matter.

public and evidentiary hearings in this matter. It has been significantly revised during the pendency of the evidentiary hearings. In fact, BNE's petition was significantly revised less than three days before the evidentiary hearing was scheduled to close in this matter – and several weeks after FairwindCT and the other parties and intervenors had the opportunity to present their witnesses, which prevented the parties and intervenors from presenting testimony regarding the revisions.

Statements made in the text of BNE's petition are no longer accurate. Exhibits F, G, H and L have been replaced entirely by new plans and studies. Exhibits I, J and M have been revised. Additional studies were conducted 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 disclosing a new witness less than three days before the evidentiary hearing is scheduled to close in this matter. BNE also revealed, again just days before the evidentiary hearing concluded, that it plans to conduct addition 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, 33.) 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. 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. Due to the significant time constraints associated with this proceeding and its briefing schedule, this brief focuses on BNE's failure to meet its lower threshold burden of compliance with DEP water quality standards and its failure to demonstrate compliance with DEP noise regulations. In so limiting its brief, FairwindCT does not concede that the project will not have a substantial adverse effect. In fact, FairwindCT submits that BNE has failed to meet not only the higher burden of substantial adverse environmental effect, 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 Prefiled 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.

II. BNE's Proposed Project Does Not Comply with Connecticut's Noise 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.
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> (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: "State 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.

Since that time, 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 plat 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 (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 (Sept. 9, 2008, Rittenband, J.) (rev'd on other grounds) (referencing noise levels at the residential property line).

Other Connecticut cases dealing with noise make explicit references to planning and zoning ordinances that require noise compliance at the property line or make no reference to sound levels at the property line for other reasons. For example, in Esposito v. New Britain Baseball Club, Inc., 49 Conn. Supp. 509 (2005), Judge Berger found that fireworks displays at a baseball game were a nuisance and disturbed the enjoyment of the plaintiff's property. Judge Berger made no reference to noise levels at the property line; he did recognize that sporting events were exempt from the noise regulation pursuant to a specific exemption, but fireworks are not a necessary part of a baseball game. Moreover, Judge Berger noted that RCSA §22a-69-1.5 provides that compliance with the noise regulation is no defense to a nuisance claim.

The Town of Prospect has adopted an ordinance providing for the reduction or elimination of excessive noise and the administration thereof. (Town of Prospect, Ex. 5, Noise Ordinance.) The ordinance is generally similar to the state regulations. Section 6(a) provides: "It

shall be unlawful for any person to emit or cause to be emitted any noise beyond the boundaries of his/her premises in excess of noise levels established in this article." Section 5(c)(2) provides that measurements to determine compliance shall be taken at a point that is located more or less one foot beyond the boundary of the emitter's premises. (Town of Prospect, Ex. 5, Noise Ordinance, Sections 5 &6.) Measurement of noise levels under the Town of Prospect noise ordinance is therefore explicitly to the property line, not the receptor's bedroom.

Prospect's ordinance also resolves the industrial versus residential argument by expressly defining emitters and receptors by their zoning classifications. (Town of Prospect, Ex. 5, Noise Ordinance, Section 2.) This proposed project site is designated a "Residential Zone" under the definition section of the noise ordinance because it is zoned residential under the Town's zoning ordinance and zoning map. (See Bulk Filing, Prospect Zoning Ordinance, Prospect Zoning Map.) The correct criteria for measurement is therefore residential to residential.

Any argument that the existence of cell towers 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. Prospect's noise ordinance knows no such rule. The Council has no authority to overrule this ordinance. Under the Town noise ordinance, the site may only be treated as industrial if its zoning status is changed. BNE has sought no such zoning change.

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.

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 vote conclusions regarding details presented in BNE's report. Specifically, he found:

- The report claimed that all portions 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. The report 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 use 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 to15 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 sound levels will exceed both the Town of Prospect's noise ordinance and the State of Connecticut noise regulations based on a comparison of residential-two-residential nighttime noise limits.

(Bahtiarian Pre-Filed Testimony, pages 4-12.) Sound levels as calculated by Mr. Bahtiarian show that there will be 1 to 3 dB excess to DEP limits at night at various property line locations. (Bahtiarian Pre-Filed Testimony, page 9 & Ex. 5.)

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 exceeds 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, page 9; 3/15/11 Tr. 130:3-131:4, 183:15-187:18.)

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 the regulations promulgated thereunder, the Council must deny BNE's petition.

III. BNE's Petition, Even with Subsequent Amendments, 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 revising its original plans three times.

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.) Not one set of BNE's plans complies with the requirements of the water quality standards presented in those DEP manuals.[2]

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[2] In recent filings in Petition Nos. 983 and 984, BNE has raised the argument that the 2002 Guidelines and 2004 Manual are not requirements, but are merely guidance documents. BNE is **Error! Main Document Only.**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

The failures of the first three sets of site plans and related stormwater management and erosion control plans are discussed in detail in the prefiled testimony, supplemental testimony and second supplemental testimony of William Carboni, a professional engineer licensed in Connecticut who reviewed the first three sets of plans at the request of FairwindCT. (See Mr. Carboni's testimony, dated Feb. 16, 2011, Mar. 8, 2011 and Mar. 28, 2011.) Mr. Carboni details 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, outlet protection and level spreaders – all features that are required to prevent deposits of sedimentation into the wetlands and watercourses on the site and prevent pollution to the waters of the State.

At the evidentiary hearing of March 31, 2011, Mr. Cline, BNE's engineer responsible for the site plans and related stormwater management and erosion control plans, testified that the fourth set of plans, submitted on March 28, 2011, are most protective of the waters of the State. (3/31/11 Tr. 151:6-10.) Even those plans, however, are not final and lack necessary features. Examples of the deficiency of the March 28 plans include:

- The March 28 plans lack grading at the intersection of the site access road and Kluge Road. Mr. Cline testified that grading will be required at that location, and that off-site grading may be needed. That grading cannot be completed until site surveying is completed. (3/31/11 Tr. 146:5-147:3.)

Erosion Control Act and the General Permit. (See 3/15/11 Tr. 134:25-136-1; 141:4-20; 2002 Guidelines, page 1-4; 2004 Manual, pages 1-6–1-7.)

- The March 28 plans call for an ancillary building that will have a septic system and require a well permit. (3/31/11 Tr. 87:25-88:15.) BNE has not collected any test pit data on the site to show that a septic system is feasible. (3/31/11 Tr. 140:6-8.)
- The March 28 plans contain slopes are steeper than 3:1 with a vertical height of more than 15 feet. (3/31/11 Tr. 140:20-23.) 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.; see also 3/31/11 Tr. 140:15-141:2.) The March 28 plans do not contain reverse slope benches. (3/31/11 Tr. 140:15-17.) BNE has not conducted geotechnical analysis on site that would permit an engineer to design alternative structural features. (See 3/31/11 Tr. 140:9-11.)
- The March 28 plans provide for two bioretention ponds or basins. (Tr. 3/31/11 139:23-140:2; Cline Supp. Testimony, dated Mar. 28, 2011, Sheets C-310 & -311.) 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. (Tr. 3/31/11 140:9-11.) Nor has it collected infiltration data or determined the depth of the season-high groundwater on the site. (Tr. 3/31/11 140:12-14.) BNE has not done an in-season vernal pool study on the site, nor has it conducted in-season, on-site studies for amphibians, despite the observation of a Wood Frog *(Rana sylvatica),* a vernal pool obligate species, at the site. (Petition, Ex. I; Klein Prefiled Testimony, page 3.) 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.) Without vernal pool and amphibian surveys, BNE cannot demonstrate that its proposed stormwater ponds will comply with the 2004 Manual requirements and protect not only the waters of the State, but also the amphibians that may be breeding on site or adjacent to the site.

- The 2002 Guidelines require that there be no increase in the peak rate of flow between pre-development and post-development conditions. (3/31/11 Tr. 147:4-8.) The March 28 plans show an increase in all four drainage basins that BNE studied. (Cline Supp. Testimony, dated Mar. 28, 2011; 3/31/11 Tr. 147:9-13.) Mr. Cline testified that that violation of the 2002 Guidelines will be remedied by the inclusion of attenuation basins that "will be added" to the plans. (3/31/11 Tr. 147:13-18.)

- The 2002 Guidelines require that calculations in erosion and sediment control plans be based on total drainage area. (2002 Guidelines, 5-11-6, 5-11-24; 3/31/11 Tr. 147:19-147:22.) The calculations in the March 28 erosion and sediment control plan is instead based on total disturbed area. (Cline Supp. Testimony, dated Mar. 28, 2011, Ex. 3, App'x C; 3/31/11 Tr. 147:23-148:6.)

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 revised three times, remain incomplete and still contain errors. Mr. Cline testified that "the plans will meet the Connecticut guidelines when the plans are 100 percent construction drawings. We are not at that stage yet." (Tr. 3/31/11 137:21-138:10 (emphasis added); see also 3/31/11 Tr. 158:4-7 (MR. TINLEY: "Even today, sir, you're telling the Council that these plans will comply with all applicable standards and guidelines when they are done, correct? MR. CLINE: Yes." (emphasis added).) 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 surveying, geotechnical analysis and determination of groundwater levels "will be done later." (See 3/31/11 Tr. 137:3-7, 138:14-18, 140:3-14, 158:4-18.) BNE's repeated claims that, if approved, its project will eventually meet those standards is on its face ground to deny this petition.

IV. 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., 3/31/11 Tr. 64:18-25 (C. Walsh); 65:16-18 (P. Corey); 65:19-22 (C. Walsh); 54:2-7 (P. Corey); 150:23-151:5 (M. Bachman); 153:4-8 (M. Cline); 153:14-18 (C. Larson); 158:19-24 (C. Larson).)

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 16-50*l*(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 16-50*l*(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.[3] 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 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 statue. 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

[3] FairwindCT is 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.

> 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.

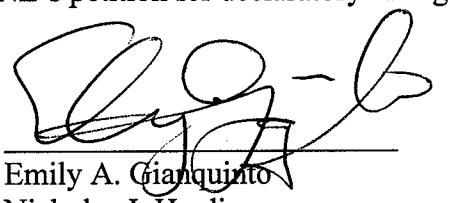
The Council may not, therefore, approve BNE's petition and rely on the development and management plan as an opportunity to work out the details of the proposed project. BNE's petition must be denied for failure to comply with state law, both at the time the petition was filed and after subsequent revision.

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. 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.

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 2nd day of May, 2011:

Carrie L. Larson
Paul Corey
Jeffrey J. Tinley
Hon. Robert J. Chatfield
Thomas J. Donohue, Jr.
Eric Bibler

and sent via e-mail only to:

John R. Morissette
Christopher R. Bernard
Joaquina Borges King

Emily A. Gianquinto