

March 4, 2020

Melanie A. Bachman
Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

BY EMAIL PDF AND HAND DELIVERY

Re: Petition No. 983 - Request for party status and notice of intervention under CEPA

Dear Ms. Bachman:

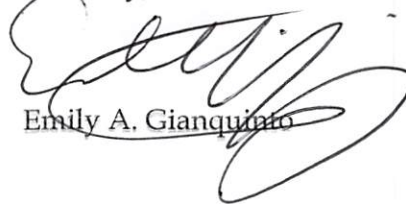
Enclosed for filing please find an original and 15 copies of Julia and Jonathan Gold's request for party status and notice of intervention under the Connecticut Environmental Protection Act ("CEPA"). The Golds own property that abuts 45 Flagg Hill Road in Colebrook, upon which BNE Energy, Inc. is for the first time asking the Council to site a new wind turbine by way of its D&M Plan modification, submitted on January 9, 2020. A copy of this request and notice is also being delivered to the service list.

I ask that all communications and filings concerning this matter be directed to me by email. My full contact information is as follows:

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Hartford, CT 06106
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If you have any questions, please do not hesitate to contact me.

Sincerely,



Emily A. Gianquinto

Enclosure

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a
Declaratory Ruling that no Certificate of
Environmental Compatibility and Public Need
is Required for the Construction, Maintenance,
and Operation of a 4.8 MW Wind Renewable
Generating Facility Located on Flagg Hill Road
in Colebrook, Connecticut (“Wind Colebrook South”).**

Petition No. 983

March 3, 2020

**REQUEST FOR PARTY STATUS AND NOTICE
OF CEPA INTERVENTION BY JULIA AND JONATHAN GOLD**

Julia and Jonathan Gold are the owners of property located at 319 Beckley Road in Norfolk, Connecticut and adjacent property located on Skinner Road in Winchester, Connecticut (collectively, the “Gold Property”). Based on the “modification” BNE Energy, Inc. (“BNE”) has proposed to make to its Development and Management (“D&M”) Plan, the Gold Property would abut the new site for the project, as it sits right on the Norfolk-Colebrook town line and the Colebrook-Winchester town line, adjacent to the southernmost new Flagg Hill Road property that BNE proposes to acquire and “merge” into its current project site.

The Golds seek party status in the Petition of BNE Energy Inc, (“BNE”) for a Declaratory Ruling for the Location, Construction and Operation of a 4.8 MW Wind Renewable Generating Project on Flagg Hill Road in Colebrook, Connecticut (“Wind Colebrook South”) D&M Plan Modification, filed January 9, 2020. The Golds also hereby intervene in this proceeding under the Connecticut Environmental Protection Act (“CEPA”).

As abutters only to the new project site proposed by BNE, rather than the site previously approved by the Council, this is the first opportunity for the Golds to weigh in on the project, which BNE now seeks to “modify” to site a 646-foot high turbine less than 350 feet from one of the Golds’ property lines and just 523 feet from another. BNE is essentially asking the Council to

approve a taking of the Gold Property in a proceeding that the Golds only received notice of a few weeks ago, and BNE only revealed the exact proximity of the turbine to abutters by way of interrogatory responses 11 days ago. The Council must permit the Golds to participate in this proceeding.

Contact information for proposed party:

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Contact information for representative of proposed party:

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I. Manner in which proposed party claims to be substantially and specifically affected

The proposed “modification” will substantially and specifically affect the Golds because, according to BNE’s own submissions in response to the Council’s first set of interrogatories, the third turbine would be located within approximately 1,027 feet of their home, just 321 feet of one of their property lines, and 521 feet from their other property line. A significant portion of the Gold Property is located within the setback area identified by a comparable turbine manufacturer cited by BNE, which on its face should result in the denial of the “modification.”

The proximity of the Gold Property to the third turbine location now being proposed by BNE is not included anywhere in BNE’s initial request for modification of its D&M Plan, and was revealed only in BNE’s February 21, 2020 responses to the interrogatories issued by the Council. In Exhibit A to those interrogatory responses, the Adjacent Property Owners Location Map, the Gold Property is clearly marked as directly adjacent to the proposed turbine location. In Exhibit C to those interrogatory responses, in what BNE calls the “Enercon Ice Risk Assessment,” the Golds’

residence, barn and pool, driveway and a very small “walking area” – though not their property lines – are clearly marked in Figure 1, and it appears that much of the Gold Property is within the “ice fall/throw probability” zone in Figure 2 (both drawings are reproduced below).



Figure 1: Areas considered for the ice throw analysis

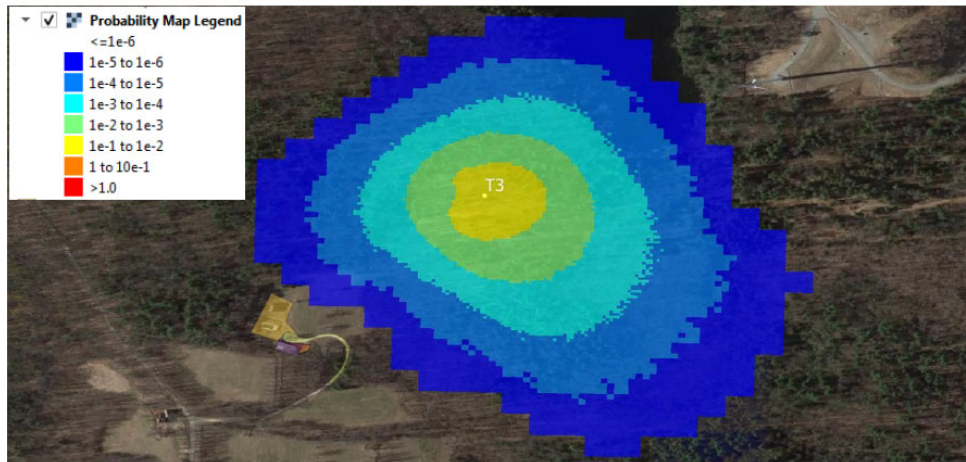


Figure 2: Ice fall/throw probability results (hits/m2/year)

In the above figures, one of the Golds’ property lines is located approximately halfway between the location of the turbine and the edge of the Golds’ house. The idea of such a small “walking area” ignores the reality of the Golds’ use of their property, including the large field area that is

visible in Figure 1 and their regular use of the entire property, which includes several walking trails. Notably, the Golds were not made aware of any of those affects until February 21, 2020, when BNE submitted responses to the Council’s interrogatories.

In sum, the Golds’ property rights and the health and safety of their family will therefore clearly be substantially and specifically affected by the Council’s decision with respect to BNE’s request.

II. Contention of the proposed party

The Golds contend that the proposed “modification” BNE submitted is so substantially different from the project described in its petition and even from the D&M Plan approved by the Council in December 2013 that it is in substance a new project — a new proposal to construct a new wind turbine facility on an entirely different site. The proposed “modification” would add two new parcels of land to the site, and in doing so, would increase the size of the project site by more than 37 acres. (BNE Narrative at 1.) The added parcels bring into the mix different abutters, implicating the due process rights of the Golds and others like them—property owners who suddenly and without notice find themselves immediately adjacent to a parcel of land that may host a wind turbine that was never before proposed, reviewed or approved by the Council. That alone is such a significant and fundamental change that demonstrates this proposal is not a mere “modification” but instead a new project that requires full review by the Council.

Accordingly, the “modification” is not properly before the Siting Council, as it only has jurisdiction over siting energy projects pursuant to statute. At present, the Council simply lacks jurisdiction over the proposed project because of the scope of the “modification.” The Council exists to *site* projects, and it already did so. It issued a decision and order, opinion and findings of fact siting a three-wind turbine project on a 19.74-acre property located at 29 and 17 Flag

Hill Road. It did *not* site a three-wind turbine project on a 116.64-acre site located at 29, 17, 45 and 53 Flagg Hill Road. This “modification” requires the filing of a new petition, which would not only ensure the Council had jurisdiction to consider it, but would ensure that all interested parties have appropriate due process protections and that the Council has the information necessary to fulfill its obligation of balancing the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to the scenic, historic, and recreational values while also assuring the welfare and protection of the people of the state. Significantly, the project being proposed by BNE would not be sited under the state’s wind regulations, as it does not even come close to complying with, among other things, the regulatory setback requirements.

The Council does not have the authority to site this new project by way of a “modification” in the D&M process. “[T]he D & M plan functions to ‘fill up the details’ in the siting council's final decision. ...The D & M plan cannot provide a substitute for matters not addressed during the application process.” *Middlebury v. Conn. Siting Council*, No. CV010508047S, 2002 WL 442383, at *5 (Feb. 27, 2002, Cohn, J.). Here, the Golds contend that BNE is trying to use the D&M modification to bootstrap the Council’s approval over a host of matters that were neither presented nor addressed during the initial proceeding, including the impact of the project on additional abutters, the environmental impact on two new parcels of land and the properties that abut them, the impacts with respect to shadow flicker, noise, viewshed and ice throw, and more. One simple example is BNE’s claims with respect to the impact of the new turbine on vernal pools and wetlands on the original Wind Colebrook South site. BNE claims that the impact will be decreased from the previously approved D&M Plan because a third turbine will be placed further away from the two high-value vernal pools located at 29

Flagg Hill Road. However, the Golds believe that their property contains vernal pools, and if that is true, the impacts caused by BNE's new proposed location would actually be greater. The same is true for wetlands. BNE claims the new turbine would reduce the impact on wetlands, but that claim is made without providing any information on the wetlands that may be present on the two new parcels of land or on the new abutters' properties. None of these issues were considered during the petition process because none of these land parcels were included in the Wind Colebrook South site or were adjacent to it. The required evaluations were simply not done.

The Golds also contend that BNE's proposed modification would have significant adverse impacts on their ability to enjoy and use the Gold Property. They purchased the Gold Property aware that two turbines were located at 29 Flagg Hill Road, and aware that a third turbine may be added to that same piece of property at some point in the future. Now, BNE is proposing to install a turbine at 45 Flagg Hill Road and 53 Flagg Hill Road, so that the third turbine would be sited just 523 feet from one of their property lines and 321 feet from another property line. The proximity of the new turbine to the Gold Property conflicts with BNE's submitted manufacturer setback requirements and would not be permissible under the wind regulations, which would require a distance of at least 971 feet from the Gold Property lines.¹

The "ice throw risk assessment" provided by BNE in response to the Council's interrogatories (at Exhibit C) is of limited assistance in assessing safety, because it does not include property lines, but even without the property lines, it does appear that much of the Golds' 319 Beckley Road property, at least, will be in the potential ice fall zone. With the nearly non-existent setback BNE has proposed for the third turbine, the Golds and their children will be

¹ The wind regulations require that turbines be sited at least 1.5 times the wind turbine height from any property lines. Regs. § 16-50j-95(a)(1)(B). Here, the wind turbine height is 197.3 meters (128 hub height + (183.6 blade diameter/2)). Under the regulations, then, the turbine must be at least 295.95 meters, or just under 971 feet, from adjacent property lines.

unable to enjoy significant swaths of the Gold Property. The 319 Beckley Road property includes a home, a pool and a barn that the Golds plan to convert for residential use. That plan is based on the special needs of one of their minor children, who is deaf and severely autistic, requiring 24-hour care. The Golds' plan to renovate the barn to enable their son and his caretaker to live in the barn when he reaches the age of majority. As the barn is even closer to the property line than the house, use of the barn would not be safe if the Council disregards even the BNE submitted manufacturer's setback requirements (for a different kind of turbine) and approves BNE's proposed "modification."

The Gold family, and particularly their special needs son, spend a great deal of time in the wooded areas on the Gold Property. Their son is especially calm when surrounded by nature, and can spend hours at a time sitting under trees, focused on handling tree branches or other natural material. He often spends hours of time at the edges of the Gold Property – areas that would become unsafe were the Council to approve BNE's proposed "modification." The Golds have built a campsite on their property that is also closer to the property line than to their house, and it too would become unsafe for use. BNE's claim that it would be putting this new turbine "further away in the woods" and "further in the woods from the homes located on Flagg Hill Road and Route 44" (BNE narrative at 3-4) ignores the significant impact on the Golds and their neighbors in both Norfolk and Winchester. These are the types of impacts minimum setback requirements were intended to avoid.

The Golds are also concerned about the noise associated with the turbine, and note that the evaluation submitted by BNE with its interrogatory responses does not include any assessment of noise levels at their property lines, as would be required by the wind regulations. *See* Regs. § 16-50j-94(d). Similarly, the viewshed analysis submitted by BNE in response to the interrogatories

does not appear to show how the Golds' view will be impacted by the siting of the new turbine in such close proximity to their property, especially given the significant increase in the height of this new turbine in comparison to the turbine originally approved by the Council. And although BNE claims that the Gold Property would not be impacted by shadow flicker, it did not submit any evidence supporting that claim, instead asserting that a consultant did some kind of unspecified work to reach that conclusion. Nor has BNE submitted any technical documentation from the manufacturer of the new kind of turbine proposed (Enercon) with respect to siting its turbines, including setback recommendations, noise level data and the like.

If the Council refuses to reject the proposed "modification" so that BNE would be forced to file a new petition, thereby ensuring that all required information is on the record and available to parties, the Golds should at least be entitled to participate in this late stage of the petition proceeding and to ask questions of BNE. It is simply unreasonable and unfair to permit BNE to use the Council's approval of a different project on different pieces of property more than eight years ago to avoid regulatory requirements now applicable to siting wind turbines, violate abutters' due process rights and fundamentally change the project in this manner. BNE's proposed "modification" should be rejected and BNE should be directed to file a new petition for declaratory ruling for its proposed new single-turbine facility. That is the only way the Council will be able to fairly assess the project under the standards applicable to siting wind turbines, and the new abutters will have an adequate opportunity to review the potential impacts of the project. Moreover, it is the only way to ensure that the new abutters, including the Golds, are provided with due process.

III. Relief sought by the proposed party

With respect to the proposed D&M “modification,” the Golds intend to argue that BNE is improperly attempting to circumvent the regulatory framework that applies to wind energy development projects by asking the Council to bootstrap this third turbine into its existing project. The modification process cannot be used for this purpose. This is a proposal for a turbine to be located on two new properties, to be accessed by a brand-new road, to abut new residential properties and a new town, and to include significantly different technology, such as a much taller turbine manufactured by a different company and capable of generating more energy. An objective comparison between the turbine project originally approved by the Council and the turbine project described in the “modification” confirms that it is a new project at its core – labeling it a “modification” cannot obscure that conclusion.

All of these facts and more demonstrate that the Council should deny BNE’s proposed “modification” and it should be required either to build the third turbine on the site previously approved, or to come back to the Council with a properly filed petition that would permit the Council to consider the project as a whole and allow all interested parties to fully participate in a hearing, present evidence, and exercise any right to appeal from the Council’s decision, if an appeal is warranted. If the Council permits BNE to proceed with this proposed “modification,” it will deny the Golds and other interested parties their due process rights, and in the case of the Golds, that denial will essentially result in a taking of their property given that a significant portion of their property sits within the setback area that BNE specifically identified, based on the manufacturer specification from a comparable unit. Indeed, the new turbine would be sited so close to the Gold Property that were it to fall, more would land on the Gold Property than at 53 and 45 Flagg Hill Road.

Should the Council reject BNE's request to modify its D&M Plan and require it to submit a new petition, the Golds would seek in that hearing to ensure that BNE's petition complies with the wind regulations and does not interfere with or contravene their property rights.

IV. Statutory or other authority therefore

The Golds are entitled to party status pursuant to Sections 4-177a, 16-50l, 16-50n, 22a-14 through 22a-20 of the Connecticut General Statutes and Sections 16-50j-13 through 17, 16-50j-40 and 16-50j-43 of the Regulations of the Siting Council.

In particular, as abutters to the two new Flagg Hill Road properties that BNE proposes to acquire and "merge" into its own Flagg Hill Road property, the Golds would unquestionably be required to receive notice of the filing *had BNE actually filed a new petition*. See Conn. Gen. Stat. §§ 16-50l(b), 16-50n(a); Regs. § 16-50j-40(a). The Golds are also requesting party status as intervenors under the Connecticut Environmental Protection Act ("CEPA"), which permits any person to "intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." See Conn. Gen. Stat. §§ 22a-19, 22a-20.

V. Nature of the evidence that the petitioner intends to present

If granted party status, the Golds intend to present evidence including, but not limited to:

- Testimony by the Golds about matters concerning their property; its proximity to the new turbine that BNE proposes to install; the impact that such installation in violation of setback recommendations and the State of Connecticut's regulations concerning wind turbine facilities would have on their family's safe use and enjoyment of their property; their plans for the development of the barn on their

property into a residence for use by their severely autistic and deaf minor child when he reaches the age of majority;

- Testimony by an appropriate expert about the adverse impact of the proposed new development on the vernal pools and wetlands located on the Gold Property;
- Evidence, whether by testimony or otherwise, that the proposed “modification” will unreasonably impair and/or destroy the public trust in the water of the state and in the natural resources of the state by causing the clear cutting of acres of land, thereby disturbing or destroying wetlands and watercourses and wildlife habitats; and
- Evidence, whether by testimony or otherwise, of the numerous ways in which BNE’s “modification” is actually an attempt to avoid the application of the wind regulations, which would result in siting a third turbine in unsafe proximity to residential property and would permit BNE to escape its burdens with respect to environmental, noise and visual surveys that now apply to wind turbine facilities.

**PROPOSED PARTY
JULIA AND JONATHAN GOLD**

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VERIFICATION

I, Jonathan Gold, being duly sworn, depose and say that I have read the foregoing Request for Party Status and Notice of Intervention, and that the allegations contained therein are true to the best of my knowledge.

By: 
Jonathan Gold

Subscribed and sworn to before me this 3rd day of March, 2020.




Notary Public / Commissioner of the Superior Court
My Commission Expires:

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:

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