



STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

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VIA ELECTRONIC MAIL

DATE: December 12, 2020

TO: Council Members

FROM: Melanie A. Bachman, Esq.
Executive Director/Staff Attorney *MAB*

RE: **PETITION NO. 1408** – FairWindCT, Inc., et al petition, pursuant to Connecticut General Statutes §4-176, for a declaratory ruling that: (a) the January 9, 2020 Development and Management Plan (D&M Plan) Modification submitted by BNE Energy, Inc. in Petition No. 983 conflicts with the Connecticut Siting Council's (Council) June 2, 2011 final decision on Petition No. 983; (b) the Council did not have jurisdiction over the D&M Plan Modification; (c) the Council did not have statutory authority to approve the D&M Plan Modification; (d) the D&M Plan Modification violated due process rights; and (e) the D&M Plan Modification violates the Connecticut Environmental Protection Act. **DRAFT Staff Report.**

On January 9, 2020, in compliance with Condition 2 of the Connecticut Siting Council's (Council) June 2, 2011 Decision and Order (D&O or Final Decision) on Petition 983 that required the submission of a Development and Management Plan (D&M Plan) for the approved **3-turbine** wind electric generating facility on Flagg Hill Road in Colebrook, Connecticut (Wind Colebrook South or WCS),¹ and pursuant to Regulations of Connecticut State Agencies (RCSA) §16-50j-62 that allows for significant changes to an approved energy facility D&M Plan, BNE Energy, Inc. (BNE) submitted a D&M Plan Modification to complete construction of the third approved wind turbine (T3) at WCS (January 9, 2020 D&M Plan Modification). WCS is the only existing, utility-scale wind electric generating facility in the state.²

The Council approved the WCS D&M Plan on November 22, 2011. Two of the three approved wind turbines (T1 and T2) at WCS achieved commercial operation in November 2015. On July 17, 2018, in compliance with Condition 7 of the Council's D&O, BNE requested a three year extension of time to complete construction of T3.³ The Council granted BNE's request on August 31, 2018. The extended deadline is September 23, 2021.

On March 6, 2020, the Council approved BNE's January 9, 2020 D&M Plan Modification to complete construction of T3 subject to the same conditions ordered by the Council in its June 2, 2011 D&O (March 6, 2020 D&M Plan Modification approval).⁴

¹ Petition 983, Record, Final Decision and D&M Plan, June 2, 2011, *available at* https://portal.ct.gov/CSC/3_Petitions/Petition-Nos-0001-1219/Petition-No-983-BNEColebrook

² On June 9, 2011, in Petition 984, the Council issued a Declaratory Ruling to BNE for construction, maintenance and operation of a separate 3-turbine wind electric generating facility off Winsted-Norfolk Road (Route 44) in Colebrook known as Wind Colebrook North. The Declaratory Ruling for Wind Colebrook North expired on September 23, 2018.

³ Petition 983, Motion for Extension to Complete Construction of WCS, *available at* https://portal.ct.gov/-/media/CSC/1_Dockets-medialibrary/Petition_983/dm_plan/pe98320180717MotionforExttoCompleteConstructionpdf.pdf

⁴ Petition 983, D&M Plan Modification Decision and Staff Report, March 6, 2020, *available at*: https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos0001-1100/PE983/DandMRev/98320200306dmplanmoddctrstaffrpt.pdf (additional condition to submit FAA determinations).

On June 1, 2020, after submitting three separate Freedom of Information Act requests to the Council between March 4, 2020 and March 7, 2020, FairwindCT, Inc. (Fairwind), a party and Connecticut Environmental Protection Act (CEPA) intervenor to Petition 983, Julia and Jonathan Gold (Golds), and the Grant Swamp Group (GSG), collectively, the “Petitioners,” submitted a Petition for a Declaratory Ruling (Petition) to the Council contending that BNE’s January 9, 2020 D&M Plan Modification conflicts with the Council’s June 2, 2011 Final Decision on Petition 983. Under Connecticut General Statutes (CGS) §4-176, any person may petition an agency for a declaratory ruling as to the applicability of specified circumstances of a final decision on a matter within the jurisdiction of the agency.⁵

Petitioners seek a Declaratory Ruling from the Council that BNE’s January 9, 2020 D&M Plan Modification conflicts with the Council’s June 2, 2011 Final Decision on Petition 983 on the following bases:

- A. the Council did not have jurisdiction over the January 9, 2020 D&M Plan Modification;
- B. the Council did not have statutory authority to approve the January 9, 2020 D&M Plan Modification;
- C. approval of the January 9, 2020 D&M Plan Modification violated due process rights;
- D. approval of the January 9, 2020 D&M Plan Modification violated CEPA; and
- E. approval of the January 9, 2020 D&M Plan Modification violated state noise law.

Fairwind presented these same arguments in its appeal of the Council’s June 2, 2011 Final Decision on Petition 983. The Connecticut Supreme Court dismissed all of these arguments in its 2014 decision in the case of *FairwindCT, Inc. v. Connecticut Siting Council (FairwindCT, Inc.)*.⁶

On June 2, 2020, the Council provided notice of the Petition and developed a schedule for comments.⁷ On June 19, 2020, BNE requested party status, which was granted on July 16, 2020. Also on June 19, 2020, BNE requested a 30-day extension of the comment period, which was granted to July 31, 2020 and applied to comments from any interested person. On July 20, 2020, the Town of Colebrook (Town), a party to Petition 983, requested party status, which was granted on August 13, 2020.

During a public meeting held on October 22, 2020, pursuant to CGS §4-176, the Council voted to set the date by which to render a decision on the Petition as no later than February 26, 2021.⁸

I. History of Wind Colebrook South

It takes about 10 years from the time an energy facility is planned to the time it will supply electricity.⁹ Neighborhood changes, including property transfers, and technological advancements, including facility upgrades, are imminent within this time period.

⁵ Under CGS §4-176, within 60 days after receipt of a petition for a declaratory ruling, an agency, in writing, shall: (1) issue a declaratory ruling, (2) order the matter for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) initiate regulation-making proceedings, or (5) decide not to issue a declaratory ruling.

⁶ *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669 (2014) (affirming the 2012 Superior Court dismissal of appeal.)

⁷ Petition 1408, Record, available at https://portal.ct.gov/CSC/3_Petitions/Petition-Nos-1401-1410/Petition-No-1408-FairWindCT (notice to the Towns of Colebrook, Norfolk and Winchester, and the Petition 983 service list for comment.)

⁸ On March 10, 2020, Governor Lamont issued a Declaration of Public Health and Civil Preparedness Emergencies. Under Executive Order 7, all statutory and regulatory deadlines of administrative agencies were extended for a period of no longer than 90 days. The Petition 60-day action deadline was October 29, 2020. The decision deadline is February 26, 2021.)

⁹ Public Act 71-575; Public Act 73-458 (Litigation causes unnecessary delays in building necessary energy facilities.)

Planning, development and operation of WCS proceeded as follows:

Date	Action	Result
December 2008	BNE installed meteorological testing tower	- Town of Colebrook issued permit - collected wind speed data for 14 months
December 2010	BNE submitted Petition 983 to Council	- 12 parties and intervenors - public site review, 4 evidentiary hearing sessions and 2 public comment hearing sessions
June 2011	Council issued Final Decision on Petition 983	- with 9 conditions, including D&M Plan
July 2011	Public Act 11-245 required the Council to adopt wind regulations “ on or before July 1, 2012. ”	- <i>do not apply to WCS and are not retroactive</i>
August 2011	Fairwind appealed Council’s Final Decision on Petition 983 to Superior Court	-argued Council has no jurisdiction over wind electric generating facilities, has no statutory authority to order a D&M Plan, violated due process and violated CEPA
September 2011	BNE submitted D&M Plan per Condition 2 of D&O	-Fairwind objected claiming D&M Plan conflicts with Council’s June 2, 2011 D&O
October 2011	BNE submitted D&M Plan Modification	-requested relocation of access road over an easement across contiguous 29A Flagg Hill Road parcel -no comments from parties were received
November 2011	Council approved D&M Plan and D&M Plan Modification	-with 9 conditions and access road relocation
December 2011	BNE Notice of Commencement of Site Clearing	-notification submitted per D&O Condition 5 and D&M Plan Regulations
October 2012	Fairwind Superior Court appeal Dismissed	-Council has jurisdiction over wind electric generating facilities, has statutory authority to order a D&M Plan, and did not violate due process or CEPA
November 2012	BNE submitted D&M Plan Modification	-requested relocation* of and T1 and T2 <i>due to purchase of contiguous 29A Flagg Hill Road parcel</i> -no comments from parties were received
December 2012	Fairwind appealed Superior Court dismissal to Supreme Court	-argued Council has no jurisdiction over wind electric generating facilities, has no statutory authority to order a D&M Plan, violated due process and violated CEPA
February 2013	Council approved D&M Plan Modification	-with 3 conditions, access road and turbine relocation*
November 2013	BNE submitted D&M Plan Modification	-requested change in type* of all 3 wind turbines -Fairwind objected claiming illegal use of D&M Plan, wind regulations apply and no updated plan
December 2013	Council approved D&M Plan Modification	-with condition BNE implement the approved Ice Safety Management Plan, as applicable to the revised turbine configuration
May 2014	Council Wind Regulations become effective	- <i>do not apply to WCS and are not retroactive</i>

September 2014	Fairwind Supreme Court appeal Dismissed	-Council has jurisdiction over wind electric generating facilities, has statutory authority to order a D&M Plan, and did not violate due process or CEPA
November 2015	BNE Notice of Commercial Operation of T1 and T2	-notification submitted per D&O Condition 5 and D&M Plan Regulations
June 2017	T3 selected in DEEP 2-20 MW Clean Energy RFP	-BNE entered into Power Purchase Agreements with Eversource Energy and the United Illuminating Company for T3's output
July 2018	BNE submitted Extension Request for Completion of Construction of T3	-BNE provided <i>notice of a future request for a D&M Plan modification for construction of T3</i> -Fairwind objected to extension
August 2018	Council approved Extension Request for Completion of Construction of T3	-granted 3-year extension to September 23, 2021
January 2020	BNE submitted D&M Plan Modification	-requested relocation and change in type* of T3 -Fairwind objected claiming illegal use of D&M Plan, wind regulations apply and no updated plan
March 2020	Council approved D&M Plan Modification	-subject to same conditions ordered in the Council's June 2, 2011 D&O and additional FAA condition

***RCSA §16-50j-62(b)** allows for significant changes to an approved D&M Plan, including, but not limited to, changes in structure type and location.

II. Law and Policy

The legislature, in creating a law designed to accomplish a particular purpose, may expressly authorize an administrative agency to “fill up the details” by prescribing rules and regulations for the operation and enforcement of the law.¹⁰ The law must declare a legislative policy and establish standards for carrying it out.¹¹ In delegating authority to an administrative agency, the legislature cannot know or foresee all the possibilities that might arise and public necessity requires commitment of the decision to the administrative agency.¹²

In an appeal from an order of the Public Utilities Commission (PUC), the Supreme Court determined that the question of the proper number of railroad tracks to be laid across a bridge depends upon PUC investigation of the conditions surrounding the location and weighing these conditions in light of the public benefit.¹³ The Court found that in creating the Public Utilities Act (PUA), the legislature expressly authorized the PUC to determine the number of railroad tracks because PUA declares a legislative policy and establishes standards for carrying it out.¹⁴ The Court stated, “There is no subject matter for a hearing under Section 4 other than whether there should be one or two tracks across this bridge, and there is no method of determining this except in conformity with the principles underlying the establishment of the PUC.”¹⁵ PUA grants exclusive jurisdiction and direction over methods of construction or reconstruction of railroads in whole or in part to the PUC.

¹⁰ *New Haven v. United Illuminating*, 168 Conn. 478 (1975); *Jennings v. Conn. Light & Power Co.*, 140 Conn. 650 (1954).

¹¹ *Id.*; *Appeal of the Conn. Co. from the Public Utilities Commission*, 89 Conn. 528 (1915).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 531-535.

¹⁵ *Id.* at 534-535.

A. The Public Utility Environmental Standards Act

In 1970, the proposed construction of an electric transmission line facility over 75 miles of southwest Connecticut, a nuclear electric generating facility on an island off the shores of Norwalk and an oil-fired electric generating facility at Stamford Harbor prompted the passage of the Public Utility Environmental Standards Act (PUESA).¹⁶ PUESA is based on the premise that no energy facility will be constructed, maintained and operated in the state unless there is a demonstrable public need for it and the public need outweighs any adverse environmental effects. Like PUA, PUESA declares a legislative policy and establishes standards for carrying it out. PUESA grants exclusive jurisdiction and direction over the methods of construction or reconstruction of electric generating facilities in whole or in part to the Council.¹⁷

Contrary to Petitioners' representations, in creating PUESA, the legislature expressly authorized the Council to "fill up the details" by prescribing rules and regulations for its operation and enforcement. Relevant to Petitioners' contentions, in the exercise of its exclusive jurisdiction and direction over the methods of construction or reconstruction of electric generating facilities in whole or in part under PUESA:

1. The Council shall hire staff with an equal amount of technical expertise as the utility companies to carry out its duties.¹⁸ The Council's current staff has over 130 years of experience.
2. The Council shall in no way be limited by the applicant already having acquired land or an interest therein for the purpose of constructing a facility.¹⁹ The Council has no authority to determine property rights.
3. The Council shall adopt regulations relating to environmental factors and facility upgrades.²⁰ The Council adopted regulations, including, but not limited to, Energy Facility D&M Plan Regulations.

B. Energy Facility D&M Plan Regulations

The Council's Energy Facility D&M Plan Regulations apply to approved facilities for which the Council orders the preparation of a D&M Plan as a condition of its final decision. The D&M Plan condition must be met in order to commence construction.²¹ A D&M Plan is required at the Council's discretion and is prepared by the project developer *in conjunction with Council staff* specifying how construction will comply with the Council's final decision. (Emphasis added.)²² The D&M phase facilitates direct Council supervision over the specific construction aspects of an approved facility, including, but not limited to, changes in structure type and location.

¹⁶ Public Act 71-575; CGS §16-50g, *et seq.* (2019) (**Legislative finding** that energy facilities have a significant impact on the environment of the state and that continued operation and development of such facilities, if not properly planned and controlled, could adversely affect the quality of the environment. **Legislative purpose** to provide for the balancing of the public need at the lowest reasonable cost with the need to protect the environment; provide environmental standards and criteria for the location, design, construction and operation of facilities; and facilitate planning to implement these purposes.)

¹⁷ *Id.*; CGS §16-50x (2019); CGS §16-50t (2019); Public Act 81-369; Public Act 73-458; *Interim Committee to Make a Comprehensive Study of Electric Power Plant Siting Requirements for Connecticut Report*, February 18, 1971 at page 17.

¹⁸ CGS §16-50v (2019); Public Act 73-458.

¹⁹ CGS §16-50p(g) (2019); *Corcoran v. Conn. Siting Council*, 284 Conn. 455 (2007) (The Council has no authority to compel a parcel owner to sell or lease property, or portions thereof, for the purpose of siting a facility.); Public Act 73-458.

²⁰ CGS §16-50t (2019); RCSA §16-50j-1, *et seq.* (2019).

²¹ RCSA §16-50j-60 to 16-50j-62 (2019); *Town of Westport v. Conn. Siting Council*, 260 Conn. 266 (2002) (A D&M Plan serves to "fill up the details" in the Council's final decision and constitutes the "nuts and bolts" of the facility approved by the Council in its D&O.); *Town of Middlebury v. Conn. Siting Council*, 2002 Conn. Super. LEXIS 610 (Conn. Super. 2002).

²² CGS §22a-115(15) (2019); CGS §16-50j(c) (2019) (Ad hoc membership shall continue until **completion of the D&M Plan**.); RCSA §16-50j-60 to 16-50j-62 (2019).

Pursuant to RCSA §16-50j-60, “the Council may require the preparation of a full or partial D&M Plan for proposed energy facilities, modifications to energy facilities, or where the preparation of such a plan would help significantly in balancing the need for adequate and reliable utility services at the lowest reasonable cost to consumers with the need to protect the environment.”

Pursuant to RCSA §16-50j-61(d), “a copy, or notice of the filing, of the D&M Plan, or a copy, or ***notice of the filing of any changes to the D&M Plan***, or any section thereof, shall be provided to the service list and the property owner of record, if applicable, at the same time the plan, or any section thereof, or at the same time any changes to the D&M Plan, or any section thereof, is submitted to the Council.” (Emphasis added).

RCSA §16-50j-62 allows the Council, or its designee, to order significant changes to a D&M Plan after it has been approved. The Council’s staff is its designee.²³ RCSA §16-50j-62(b) states, in relevant part:

“(2) The certificate holder, or facility owner or operator, shall provide the Council with advance written notice whenever a significant change of the approved D&M plan is necessary... ***Significant changes to the approved D&M Plan*** shall include, but are not limited to, the following:

- (A) the ***location of a wetland or watercourse crossing***;
- (B) the ***location of an access way or a structure in a regulated wetland or watercourse area***;
- (C) the construction or placement of any temporary structures or equipment;
- (D) ***a change in structure type or location*** including, but not limited to, towers, guy wires, associated equipment or other facility structures;²⁴ and
- (E) utilization of additional mitigation measures, or elimination of mitigation measures.

The Council, ***or its designee, shall promptly review the changes and shall approve, modify, or disapprove*** the changes in accordance with [RCSA §16-50j-60(d)].” (Emphasis added).

Under RCSA §16-50j-60(d), if the Council, ***or its designee***, does not act to approve, modify or disapprove the changes to the approved D&M Plan within 60 days after receipt of it, the changes shall be deemed approved.

In 2012, consistent with Public Act (PA) 11-245, the Council initiated regulation-making proceedings specifically for siting wind turbines. The proposed wind regulations included a requirement that a full or partial D&M Plan “be prepared in accordance with the final decision rendered by the Council and in accordance with Sections 16-50j-60 to 16-50j-62, inclusive of [RCSA].” With regard to the D&M Plan requirement, Fairwind argued: “... there should be no use of a D&M Plan for siting wind turbines. The D&M Plan allows for sleight-of-hand, as petitioners can submit more specific drawings, or change turbine locations,... If the D&M Plan is allowed, the Council will make changes to the design without regard to the rights of the citizens... The Council cannot give itself power beyond that granted to them by the legislature...”²⁵

In 2014, the Council’s Wind Regulations were approved by the Attorney General and the legislature with the D&M Plan requirement. The Wind Regulations do not apply to WCS and are not retroactive.²⁶

²³ RCSA §16-50j-57 and §16-50j-72 (2019) (“Upon Council acknowledgment ***or acknowledgment of its designee***...”)

²⁴ RCSA §16-50j-2a(1) (2019) (“***associated equipment***” includes, but is not limited to, “any ***structure*** that is a necessary component for the operation of an electric generating facility.”); RCSA §16-50j-2a (36) (2019) (“***wind turbine tower***” is the base ***structure*** that supports a wind turbine rotor and nacelle.) (Emphasis added).

²⁵ Council Record of Adoption of Regulations pursuant to Public Act 11-245, An Act Requiring the Adoption of Regulations for the Siting of Wind Projects, Sections 16-50j-2a, 16-50j-18 and 16-50j-92 to 16-50j-96, inclusive, of the RCSA.

²⁶ FairwindCT, Inc., *supra* note 6 at 700-701. (***Fairwind conceded that the wind regulations are not retroactive.***)

III. BNE's January 9, 2020 D&M Plan Modification does not conflict with the Council's Final Decision.

Contrary to the claims of Petitioners, BNE's January 9, 2020 D&M Plan Modification was properly filed under the Council's Energy Facility D&M Plan Regulations. A D&M Plan is not the subject of a proceeding.²⁷ Unlike an application for a certificate, a public hearing is not statutorily required in the D&M phase. Unlike a petition for a declaratory ruling, a public hearing is not discretionary in the D&M phase. There is neither a provision for parties and intervenors nor a prohibition on ex parte communications in the D&M phase.²⁸ A D&M Plan is a tool to ensure an approved facility is constructed and operated in a manner that is compliant with the Council's final decision.²⁹ Pursuant to the legislative policy declared under PUESA and the established standards for carrying it out, a D&M Plan serves to "fill up the details" of the Council's final decision and constitutes the "nuts and bolts" of an approved facility.³⁰

Condition 2 of the Council's Petition 983 D&O states: "The Petitioner shall not commence construction activities until securing Council approval of a D&M Plan. The D&M Plan shall be *served on all parties and intervenors listed in the service list for comment* and approved by the Council in one or more sections prior to the commencement of facility construction." (Emphasis added).

It is undisputed that BNE served its D&M Plan on all parties and intervenors listed in the Petition 983 service list for comment on September 16, 2011 in compliance with Condition 2 and RCSA §16-50j-61. The D&M Plan was approved by the Council on November 22, 2011. Also in compliance with Condition 2 and RCSA §16-50j-62(b), between October 2011 and January 2020, BNE served four D&M Plan modifications on all parties and intervenors listed in the Petition 983 service list for comment. Each of BNE's four D&M Plan modifications were approved by the Council, or its designee.³¹ BNE's D&M Plan modifications included, but weren't limited to, changes in structure type and location for all three approved wind turbines at WCS.

Petitioners allege BNE's January 9, 2020 D&M Plan Modification conflicts with the Council's June 2, 2011 Final Decision because the Council lacks jurisdiction over it, the Council lacks statutory authority to approve it, and by approving it, the Council violated due process rights, CEPA and state noise law.

However, in its 2014 decision in *FairwindCT, Inc.*, the Connecticut Supreme Court concluded:

- A. the Council has jurisdiction over wind electric generating facilities;
- B. the Council has statutory authority to condition a declaratory ruling with a D&M Plan;
- C. the Council did not violate due process rights;

²⁷ CGS §4-166(4)(2019) (A matter in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after a hearing.); CGS §22a-115(15) (2019) (A D&M Plan is required at the Council's discretion, prepared by the applicant in conjunction with Council staff, specifying how project construction will comply with the Council's final decision.)

²⁸ CGS §16-50n (2019); RCSA §16-50j-61 (2019) ("...may consult with Council staff to prepare the D&M Plan.")

²⁹ *Id.*; RCSA §16-50j-60 (2019).

³⁰ *Town of Westport and Town of Middlebury*, *supra* note 21; *New Haven and Jennings*, *supra* note 10.

³¹ Petitioners argue the Council voted on earlier D&M Plan modifications and therefore staff approval of the January 9, 2020 D&M Plan Modification was unlawful. While the question of the Council's statutory authority to condition a declaratory ruling with a D&M Plan was pending with the Supreme Court in *FairwindCT, Inc.*, the Council voted on D&M Plan modifications for *all* jurisdictional facilities. Once this question was resolved by the Supreme Court in 2014, Council staff resumed approval of D&M Plan modifications for *all* jurisdictional facilities; See Docket 412 (Council 2013 approval to relocate equipment shelter to the north) and Docket 446 (Staff 2015 approval to relocate equipment shelter to the west); In the absence of a D&M Plan condition, the Council delegates approval of any project changes to Council staff.

- D. the Council did not violate CEPA; and
- E. the Council did not violate state noise law.³²

BNE's January 9, 2020 D&M Plan Modification was approved subject to the same conditions ordered by the Council in its June 2, 2011 Final Decision on Petition 983. Therefore, pursuant to CGS §4-176, the Supreme Court's 2014 decision in *FairwindCT, Inc.*, the Council's 2011 Final Decision on Petition 983, and RCSA §16-50j-62(b), the Council should deny the Petition on the following bases:

A. The Council has jurisdiction over the change in structure type and location of T3.

Under PUESA, the Council's purpose is to balance the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment. It has exclusive jurisdiction over the construction, maintenance and operation of electric generating facilities throughout the state. WCS is an existing electric generating facility. While acknowledging the Council's continued jurisdiction over WCS, Petitioners argue that BNE's January 9, 2020 D&M Plan Modification was for a "different *facility* on a different *site*" that should have been filed as a new petition for a declaratory ruling. (Emphasis added).³³ In support of this argument, Petitioners attempt to define T3 as a *facility* and street numbers as the *site*.

Under CGS §16-50i, **Facility** is defined as "... any electric generating... facility using any fuel..., including associated equipment for furnishing electricity..." T3 is not a facility. WCS is a facility. Under RCSA §16-50j-2a(1), "associated equipment" includes, but is not limited to, any structure that is a necessary component for the operation of an electric generating facility. T3 and the other two approved wind turbines at WCS are associated equipment. They are structures that are necessary components for the operation of an electric generating facility.³⁴ WCS is an approved **3-turbine** wind electric generating *facility*.³⁵

Petitioners refer to BNE's representation of "the site" in its regulatory filings as street numbers 17 and 29 Flagg Hill Road in Colebrook.³⁶ In Petition 983, BNE defined "the Property" as street numbers 17 and 29 Flagg Hill Road in Colebrook.³⁷ BNE's definition of "the Property" is not synonymous with the regulatory definition of "the site." Under RCSA §16-50j-2a(29), **Site** is defined as "**a contiguous parcel of property with specified boundaries**, including, but not limited to, the leased area, right-of-way, access and easements on which a facility and associated equipment is located, shall be located, or is proposed to be located." (Emphasis added.) For example, "the site" of a linear facility, such as a fuel or electric transmission line facility, is comprised of a contiguous parcel of property with specified boundaries over several miles known as the "right-of-way." The WCS site is a contiguous parcel of property with specified boundaries located on Flagg Hill Road in Colebrook.

Petitioners argue that the Council cannot confer jurisdiction upon itself to site facilities in the D&M phase. This was among Fairwind's principal arguments in its appeal of the Council's Final Decision and in its comments on the Council's Wind Regulations. The Supreme Court rejected this argument. Petitioners also argue that there is no Council precedent for relocation of "a facility" onto a new parcel of land that was not part of the underlying

³² *FairwindCT, Inc.*, *supra* note 6 at 688.

³³ Petition 1408, *supra* note 7 at 10-11.

³⁴ RCSA §16-50j-2a(34) (2019) ("**Wind turbine**" means a device that converts wind energy to electricity.)

³⁵ *FairwindCT, Inc.*, *supra* note 6 at 685; *Town of Preston v. Conn. Siting Council*, 20 Conn. App. 474, 487 (Conn. App. 1990) (An agency's factual and discretionary determinations are to be accorded considerable weight by the courts.)

³⁶ Petition 1408, *supra* note 7; Attachment 4 (February 3, 2020 GSG correspondence: ... "while the street address" for the GSG property is 246 Danbury Quarter Road in Winchester, the property itself extends to the north and abuts the WCS site.)

³⁷ Petition 983, Volume 1, *supra* note 1 ("BNE requests a declaratory ruling for construction, operation and maintenance of three wind turbines at 29 Flagg Hill Road and 17 Flagg Hill Road in Colebrook, Connecticut (together, the "Property."))

proceeding. Council precedent exists for approving changes in structure type and **location** through a D&M Plan modification.

In 1999, the Council approved the construction, maintenance and operation of a natural gas-fired electric generating facility in Oxford (Towantic). The Council's final decision required a D&M Plan to include final site plans that reduced the height of the facility in conjunction with shifting the initial facility location south to maximize placement of associated equipment, preserve existing natural vegetation and minimize wetland impacts. Like Fairwind, parties to the Towantic proceedings unsuccessfully appealed the Council's final decision in the case of *Citizens for the Defense of Oxford v. Connecticut Siting Council (Citizens for the Defense of Oxford)*.³⁸

In 2001, the Council approved the Towantic D&M Plan. Like Fairwind, parties to the Towantic proceedings submitted a petition to the Council for a declaratory ruling that the D&M Plan conflicts with the Council's final decision.³⁹ They argued that the new site plans negated significant environmental benefit and the changes in stack and building locations warranted an amendment to the certificate. The Council denied the parties' petition for a declaratory ruling finding the site plans and locations of associated equipment consistent with the Council's final decision, consistent with state policy, and protective of the environment. The parties appealed the Council's denial of their petition for a declaratory ruling and raised the following two issues:

1. The Council failed to hold a hearing on the D&M Plan to decide whether the facility should have been moved from its initial location; and
2. The D&M Plan exceeded its scope by increasing the amount of truck traffic to the site.

With regard to the first issue, the Superior Court found that the Council did not condition its final decision on relocation of all or part of Towantic nor did the Council require further notice or a hearing on relocation of all or a part of Towantic.⁴⁰ It further found that there is no requirement in the Council's regulations or the Uniform Administrative Procedure Act (UAPA) that the Council hold further hearings before approving a D&M Plan.⁴¹ Similarly, the Council did not condition its Final Decision on relocation of all or a part of WCS nor did the Council require further notice or a hearing on relocation of all or a part of WCS.

With regard to the second issue, the Superior Court found that the D&M Plan functions to "fill up the details" and cannot provide a substitute for matters not addressed during the application process.⁴² It further found that since the Council's final decision provided for the transmission of water to the site, the Council did not abuse its discretion in approving the use of additional trucks in the D&M Plan to accomplish this purpose.⁴³ Similarly, since the Council's Final Decision provided for the construction, operation and maintenance of three wind turbines at WCS, the Council did not abuse its discretion in approving a change in structure type and location for T3 in BNE's January 9, 2020 D&M Plan Modification to accomplish this purpose.

In its dismissal of the appeal claiming the D&M Plan conflicts with the Council's final decision, the Superior Court held that the Council's final decision to approve Towantic was affirmed in the case of *Citizens for the Defense of Oxford* and cannot now be challenged on its decision not to require relocation of the facility from its

³⁸ *Citizens for the Defense of Oxford v. Conn. Siting Council*, 2000 Conn. Super. LEXIS 2994 (Conn. Super. 2000).

³⁹ Docket 192 D&M Plan Decision and Petition 492 Final Decision, March 1, 2001, available at https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/petition_staff_reports_MediaLibrary/492192dcdmpdenial030801pdf.pdf

⁴⁰ *Town of Middlebury*, *supra* note 21.

⁴¹ *Id.* at *15-16.

⁴² *Id.*; *Town of Westport*, *supra* note 21.

⁴³ *Town of Middlebury*, *supra* note 21 at *17-19; Docket 225, D&M Plan modification approval, May 16, 2007 (approved **two on-site** 3.4 million gallon oil storage tanks in lieu of the **one approved off-site** 950,000 gallon oil tank for backup fuel.)

initial location a condition of the D&O.⁴⁴ Similarly, the Council's Final Decision to approve WCS was affirmed in the case of *FairwindCT, Inc.* and cannot now be challenged on its decision not to require relocation of T3 from its initial location a condition of the D&O.

Later in 2001, the Council approved a D&M Plan modification to change turbine models at an approved natural-gas fired electric generating facility in Meriden that necessitated a change in site configuration.⁴⁵ The turbine model design differences required all associated equipment to increase in height and be rotated 90 degrees counterclockwise from its initial location.⁴⁶ This D&M Plan modification was not for a different facility.

In 2019, the Council approved a D&M Plan for a solar electric generating facility that added acreage from a contiguous parcel to the site for development as part of the project.⁴⁷ The project developer entered into a lease for the abutting parcel to make up for the loss of production from the elimination of another parcel from project development.⁴⁸ This created new abutters. This D&M Plan modification was not for a different site.

At WCS, in 2013, the Council approved a D&M Plan modification that added acreage from a contiguous parcel to the site for development as part of the project. BNE entered into an option to purchase agreement for the abutting parcel located at 29A Flagg Hill Road in Colebrook to relocate T1 and T2.⁴⁹ This created new abutters. This D&M Plan modification was not for a different site. Later in 2013, the Council approved a D&M Plan modification to change turbine models at WCS that necessitated a change in site configuration. This D&M Plan modification was not for a different facility.

At WCS, in 2020, the Council approved a D&M Plan modification to change the T3 model and add acreage from contiguous parcels to the site for development as part of the project. Similar to the Meriden facility, the turbine model design difference necessitated a change in site configuration. Similar to the solar facility, BNE entered into option to purchase agreements for abutting parcels on Flagg Hill Road to relocate T3. This created new abutters. BNE's January 9, 2020 D&M Plan Modification was neither for a different facility nor for a different site.

The Supreme Court concluded in *FairwindCT, Inc.* that the Council has exclusive jurisdiction over wind electric generating facilities and associated equipment. WCS is an existing wind electric generating facility and its three approved wind turbines are associated equipment. RCSA §16-50j-62 allows the Council, or its designee, to approve significant changes to an approved D&M Plan, including, but not limited to, a change in structure type and location. The Council has jurisdiction over BNE's January 9, 2020 D&M Plan Modification.

B. The Council has statutory authority to approve the change in structure type and location of T3.

Petitioners argue the Council cannot give itself power beyond that granted to it by the legislature. PUESA expressly confers statutory authority on the Council to "fill up the details" by prescribing rules and regulations for

⁴⁴ *Id.* at *16-17; *Citizens for the Defense of Oxford*, *supra* note 38. ("The court must rely on the Council's final decision.")

⁴⁵ Docket 190, D&M Plan Modification, September 12, 2001.

⁴⁶ *Id.* (The approved power train was a one-on-one configuration. The new power train was a two-on-one configuration.)

⁴⁷ Petition 1313, D&M Plan, January 31, 2019 at page 6, *available at* https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1313/dandm/20190131dandmfiling/2-tobacco_valley_solar_development_management_plan_narrative.pdf; See also Petition 1234, July 19, 2019 (Staff approved a D&M Plan modification to change inverter models and relocate solar panels from their initial locations.)

⁴⁸ *Id.* (Due to the elimination of project equipment south of Hoskins Road on Parcel 5, DWW Solar sought **additional adjacent land that could be added to the site** to make up for the loss in production.)

⁴⁹ Petition 983, D&M Plan modification approval, February 13, 2013, *supra* note 1. (29A Flagg Hill Road sold in July 2013.)

the construction, maintenance and operation of electric generating facilities throughout the state.⁵⁰ CGS §16-50t requires the Council to “adopt regulations with respect to application fees, siting of facilities and environmental standards applicable to facilities, including, but not limited to, regulations and standards relating to:

1. reliability, effluents, thermal effects, air and water emissions, protection of fish and wildlife and other environmental factors; and
2. the methodical upgrading or elimination of facilities over appropriate periods of time to meet the standards established pursuant to [PUESA] or other applicable laws, standards or regulations.”

Once a final decision is issued pursuant to PUESA, construction of a facility can proceed in conformity with the terms, limitations and conditions in the Council’s final decision.⁵¹ A D&M Plan is a condition of a final decision.

In its appeal of the Council’s June 2, 2011 Final Decision on Petition 983, Fairwind argued the Council had no specific statutory authority to condition an approval on a D&M Plan, but assuming the statute permits a D&M Plan, this one was more than one that “filled up the details” of the approval because as part of its D&M Plan, BNE submitted revised plans to relocate a wind turbine.⁵² Similar to BNE’s January 9, 2020 D&M Plan Modification, the purpose of the wind turbine relocation was to reduce land clearing requirements and increase the separating distance to wetlands.⁵³ The Court determined that in light of the legislative history and intent of PUESA, the Council has statutory authority to issue a declaratory ruling subject to specific conditions, including, but not limited to, a D&M Plan.⁵⁴ The Court further determined that Fairwind lacked standing to contest the use of the D&M Plan because the D&M phase was not prejudicial to Fairwind since the conditions of the D&M Plan fall squarely on BNE and impose no costs or burdens on Fairwind.⁵⁵

Despite the 2014 decision of the Supreme Court in *FairwindCT, Inc.*, Petitioners contend that the D&M phase cannot serve as a substitute for a petition process because the Council does not have statutory authority to use the D&M phase to site wind turbines. In *Town of Middlebury*, the Court noted that pursuant to CGS §16-50p(d), if the Council determines that the location of all or a part of a proposed facility should be modified, it may condition the final decision upon such modification, provided the municipalities and residents had notice of the application or petition for a declaratory ruling.⁵⁶ Just as the Council did not condition its final decision upon modification of the location of Towantic, the Council did not condition its Final Decision upon modification of the location of T3. Instead, the Council imposed a D&M Plan condition as part of the Towantic and WCS final decisions. Both of these final decisions were upheld by the courts.

Consistent with the Council’s statutory authority under PUESA to “fill up the details” by prescribing rules and regulations for the construction, maintenance and operation of electric generating facilities throughout the state, CGS §16-50l(d) is clear that if a D&M Plan is a condition of the Council’s final decision, ***no amendment of the final decision shall be adopted after approval of the D&M Plan.***⁵⁷ D&M Plans are governed by the Council’s regulations. The Council’s regulations were adopted under the statutory authority conferred upon the Council by

⁵⁰ CGS §16-50t and CGS §16-50x (2019); *New Haven and Jennings*, *supra* note 10; *Appeal of the Conn. Co.*, *supra* note 11.

⁵¹ *Town of Killingly v. Conn. Siting Council*, 220 Conn. 516, 523 (1991).

⁵² *FairwindCT, Inc., v. Conn. Siting Council*, 2012 Conn. Super LEXIS 2465 (Conn. Super. 2012) at *35-36.

⁵³ *Id.* at *73-74.

⁵⁴ *FairwindCT, Inc.*, *supra* note 6 at 687; *Town of Preston*, *supra* note 35 at 491-92; *City of Torrington v. Conn. Siting Council*, 1991 Conn. Super. LEXIS 2084 (1991) at *22-25 (the Council may impose a condition that requires subsequent compliance with Department of Energy and Environmental Protection (DEEP) standards and regulations).

⁵⁵ *FairwindCT, Inc.*, *supra* note 6 at 688; *FairwindCT, Inc.*, *supra* note 52 at *37.

⁵⁶ *Town of Middlebury*, *supra* note 21 at *15-17.

⁵⁷ *Id.*; CGS §16-50l(d) (2019); Public Act 79-537 (Amendment proceedings allow for facility modifications ***prior to the approval of a D&M Plan.*** In an amendment proceeding, the Council shall render a decision within 90 days.)

the legislature pursuant to CGS §16-50t, including a requirement that the Council adopt regulations related to facility upgrades. All of the Council's regulations were approved by the Attorney General and the legislature. RCSA §16-50j-60 allows the Council to require the preparation of a D&M Plan for approved facilities. RCSA §16-50j-62 allows the Council, or its designee, to approve significant changes to an approved D&M Plan, including, but not limited to, a change in structure type and location. The Council has statutory authority to approve BNE's January 9, 2020 D&M Plan Modification.

C. Approval of the change in structure type and location of T3 did not violate Petitioners' due process rights.

Due process requires notice and an opportunity to be heard. In approving BNE's January 9, 2020 D&M Plan Modification, Petitioners allege the Council violated basic principles of procedural due process in administrative *proceedings* and refer to the notice requirements for a petition for a declaratory ruling for a new *facility* (Emphasis added). As described above, the D&M phase is not a "proceeding" and T3 is not a "facility."

Due process is flexible and calls for procedural protections as particular situations demand.⁵⁸ It does not guarantee any particular form of state procedure.⁵⁹ An interest in contesting the environmental impacts of an energy facility does not have the same individual impact as the interest of a person at risk of losing a professional license. Contrary to Petitioners' claims, due process rights exist in the D&M phase and Fairwind has consistently exercised them. Section 16-50j-61(d) of the Energy Facility D&M Plan Regulations and Condition 2 of the Council's Final Decision require a copy of any D&M Plan modification be provided to the service list for comment. BNE provided a copy of its January 9, 2020 D&M Plan Modification to the service list for comment. The service list includes, but is not limited to, Fairwind, the Town and abutting property owners. The Council received comments on BNE's January 9, 2020 D&M Plan Modification from Fairwind, the Town and abutting property owners who are on the service list. The Council also received comments on BNE's January 9, 2020 D&M Plan Modification from abutting and non-abutting property owners in the Towns of Colebrook, Norfolk and Winchester who are not on the service list, including GSG and the Golds.

1. Petitioners were provided notice and an opportunity to be heard on BNE's January 9, 2020 D&M Plan Modification.

The record of Petition 983, including, but not limited to, the petition for a declaratory ruling, written evidence submitted by the parties, hearing transcripts, the Final Decision, the D&M Plan, D&M Plan modifications, 104 bi-weekly environmental monitoring reports, 20 stormwater monitoring reports, 14 erosion and sedimentation control reports, 2 post-construction amphibian monitoring reports, 3 post-construction bird and bat monitoring reports, 3 post-construction noise monitoring reports and a final noise compliance measurement study, has been available at the Council's office and on the Council's Petition 983 webpage since BNE submitted Petition 983 in December 2010.⁶⁰ It reflects the Council's approval of the construction, operation and maintenance of a three-turbine wind electric generating facility on June 2, 2011, the Council's approval of the facility D&M Plan on November 22, 2011 and the Council's approval of four D&M Plan modifications between 2011 and 2020.

The record also reflects that notice of BNE's plan to construct T3 was provided in 2018. Pursuant to Condition 7 of the Council's Final Decision, BNE requested an extension of time to complete construction of T3 stating, "BNE entered into power purchase agreements with Eversource Energy and the United Illuminating Company for

⁵⁸*FairwindCT, Inc.*, *supra* note 52 at *66; *Concerned Citizens of Sterling v. Conn. Siting Council*, 215 Conn. 474, 484 (1990).

⁵⁹ *Id.* at *52-54, citing *Katz v. Brandon*, 156 Conn. 521, 537-38 (1968)

⁶⁰ Petition 983, *supra* note 1.

T3 on June 20, 2017. BNE is looking to complete its permitting requirements, ***including the submittal of a revised D&M Plan to the Council which addresses T3.***” (Emphasis added). Fairwind submitted comments in opposition to BNE’s request for an extension of time to complete construction of T3 alleging a “bait and switch” lack of transparency while also specifically acknowledging the Council approved “larger and more powerful” turbine models in BNE’s November 2013 D&M Plan modification. The Council granted BNE’s request for an extension of time to complete construction of T3. The extended deadline is September 23, 2021.

Parties do not have standing to raise a lack of notice to any other party.⁶¹ Petitioners allege lack of notice of BNE’s January 9, 2020 D&M Plan Modification to the Town of Winchester and the abutting property owner at 47 Flagg Hill Road in Colebrook.⁶² Due to its boundary within 2,500 feet of the WCS site, the Town of Winchester, as well as the Town of Norfolk, received notice of Petition 983 on December 6, 2010 and notice of the Council’s public hearing on February 11, 2011.⁶³ Both municipalities opted not to participate and are not on the service list. Federal National Mortgage Association, the abutting property owner of record for 47 Flagg Hill Road in Colebrook, received notice of BNE’s January 9, 2020 D&M Plan Modification on January 31, 2020.

All of the Petitioners received notice of BNE’s January 9, 2020 D&M Plan Modification and all of the Petitioners had an opportunity to be heard on BNE’s January 9, 2020 D&M Plan Modification:

Fairwind: Fairwind was formed in 2010 for the purpose of “educating the public about regulation and operation of industrial wind generating projects in Connecticut.” Its principals reside within 1-1.5 miles of WCS.⁶⁴ Fairwind actively participated in the Council’s Petition 983 proceedings, unsuccessfully appealed the Council’s Final Decision, actively participated in the Council’s wind regulation-making proceedings, and consistently commented on BNE’s compliance with the conditions of the Council’s Final Decision, including, but not limited to, the D&M Plan, certain D&M Plan modifications⁶⁵ and BNE’s request for an extension of the construction deadline for T3. Fairwind is on the Petition 983 service list and received notice of BNE’s January 9, 2020 D&M Plan Modification on January 9, 2020. Fairwind submitted service list change requests on January 30, 2020 and March 4, 2020.⁶⁶ Also on March 4, 2020, 55 days after receiving notice of BNE’s January 9, 2020 D&M Plan Modification and 5 days before the Council’s deadline under the Energy Facility D&M Plan Regulations to render a decision on the changes to it, Fairwind submitted an objection claiming no statute or regulation allows for project modifications in the D&M phase and the wind regulations apply to WCS.⁶⁷

⁶¹ *Town of Middlebury, et al v. Conn. Siting Council*, 326 Conn. 40 (2017); *City of Torrington*, *supra* note 54.

⁶² Petition 1408, *supra* note 7 at 11, 15-16; Petition 983, *supra* note 1, Exhibit D, Findings of Fact (FOF) ¶10, 14-15, and BNE January 9, 2020 D&M Plan Modification.

⁶³ Petition 983, *supra* note 1, Exhibits D and E; FOF ¶11-12 (BNE published notice in the Litchfield County Times on December 3, 2010, provided notice by certified mail to abutting property owners on December 6, 2010 and by Federal Express service to federal and state officials, as well as officials in the host municipality (Town of Colebrook) and officials in municipalities within 2,500 feet (Towns of Winchester and Norfolk) on December 6, 2010. The Council published notice in the Hartford Courant on February 7, 2011, including a public field review of the WCS site on March 22, 2011, two public comment hearing sessions held after 6:30 p.m. on March 22, 2011 and March 23, 2011 at the Northwest Regional High School in Winsted, and four evidentiary hearing sessions held on March 23, April 14, April 21 and April 26, 2011.)

⁶⁴ *FairwindCT, Inc.*, *supra* note 6 at 675. (Fairwind President, Joyce Hemingson, resides at 44 Rock Hall Road, Colebrook.)

⁶⁵ Fairwind did not comment on BNE’s November 2, 2012 D&M Plan modification related to the purchase of an additional parcel located on Flagg Hill Road in Colebrook that created new abutters, modified the access road and relocated T1 and T2.)

⁶⁶ The January 30, 2020 service list change request was from the address of an attorney of record to Fairwind’s president. The March 4, 2020 service list change request was from the address of Fairwind’s president to another attorney of record.

⁶⁷ RCSA §16-50j-60 requires the Council, or its designee, to approve, modify or disapprove changes to an approved D&M Plan within 60 days after receipt of it. The same Fairwind objection to BNE’s November 5, 2013 D&M Plan modification was overruled by the Council on December 17, 2013. In 2014, Fairwind conceded the wind regulations are not retroactive.

Golds: The Golds purchased the property at 319 Beckley Road in Norfolk and adjacent property located on Skinner Road in Winchester in 2018 from a common owner. The classified land use is “residential/excess land/farm” and “forest,” respectively. On December 26, 2010, during the Petition 983 proceedings, the former common owner of the properties submitted comments to the Council requesting a moratorium on wind energy applications. See Attachment 1. The former owner did not request party or intervenor status. Also during the Petition 983 proceedings, the property at 319 Beckley Road in Norfolk was modeled as a residential receptor for noise, visibility, shadow flicker and ice throw. On January 27, 2020, the Golds submitted comments to the Council on BNE’s January 9, 2020 D&M Plan Modification. See Attachment 2. The Golds expressed concerns relative to the applicability of the wind regulations, health, safety and the environment. The Golds received notice of the D&M Plan Modification at their address of record in Seekonk, Massachusetts on January 31, 2020.

GSG: GSG purchased the 272-acre property at 246 Danbury Quarter Road in Winchester in 1980. The classified land use is “forest.” GSG’s principals reside at 458 Winchester Road in Norfolk. On January 10, 2011, during the Petition 983 proceedings, GSG, “as an owner of property in Norfolk and Winchester that is very close” to the WCS site, submitted comments to the Council requesting a moratorium on wind energy applications. See Attachment 3. GSG did not request party or intervenor status. Also during the Petition 983 proceedings, the GSG property at 246 Danbury Quarter Road was encompassed in the modeling as a receptor for noise, visibility, shadow flicker and ice throw. GSG received notice of BNE’s January 9, 2020 D&M Plan Modification at their address of record at 458 Winchester Road in Norfolk on January 31, 2020. On February 3, 2020, GSG submitted comments to the Council on BNE’s January 9, 2020 D&M Plan Modification. See Attachment 4. GSG expressed concerns relative to the applicability of the wind regulations, health, safety and the environment.

2. Petitioners’ concerns were addressed in the Council’s March 6, 2020 approval of BNE’s January 9, 2020 D&M Plan Modification.

All of the concerns raised by Petitioners relative to BNE’s January 9, 2020 D&M Plan Modification were raised during the proceedings held on Petition 983 and all of the concerns raised by Petitioners relative to BNE’s January 9, 2020 D&M Plan Modification were addressed in the Council’s March 6, 2020 D&M Plan Modification approval.⁶⁸ First, with regard to Fairwind’s March 4, 2020 objection to BNE’s January 9, 2020 D&M Plan Modification, its same objection to BNE’s November 5, 2013 D&M Plan modification was overruled by the Council. This created Council precedent. Second, with regard to Petitioners’ concerns about the applicability of the Wind Regulations, they do not apply to WCS. The Council’s June 2, 2011 Final Decision preceded the July 1, 2011 passage of PA 11-245.⁶⁹ Third, with regard to health, safety and the environment, the Council reached the following conclusions in its June 2, 2011 Final Decision and its March 6, 2020 D&M Plan Modification approval:

Setbacks: In its 2011 Final Decision, the Council found the nearest *residential* property line to any of the three wind turbines was 140 feet (45 Flagg Hill Road, Colebrook) and the nearest *residence* to any of the three wind turbines was 1,005 feet (29A Flagg Hill Road, Colebrook).⁷⁰ The Council found the nearest *forested* property line to any of the three wind turbines was 235 feet (the Nature Conservancy).⁷¹ The Council also found that industry setback standards for blade failure, ice throw, tower collapse, rotor sweep and falling objects vary from 1.1 to 1.5 times the total wind turbine height from objects of concern.⁷² In its March 6, 2020 D&M Plan Modification approval, the Council found the nearest *residential* property line to T3 is 523 feet (319 Beckley Road, Norfolk)

⁶⁸ *City of Torrington*, *supra* note 54 at *21; D&M Plan Modification Decision and Staff Report, March 6, 2020 *supra* note 4 at 6-13.

⁶⁹ *FairwindCT, Inc.*, *supra* note 6 at 684 (Fairwind conceded the wind regulations are not retroactive); CGS §16-50kk (2019).

⁷⁰ Petition 983, *supra* note 1, FOF ¶40-43.

⁷¹ *Id.*, FOF ¶41-42.

⁷² *Id.*, FOF ¶75-79; 2017 GE Technical Documentation (“Objects of concern” include public use areas, residences, office buildings, public buildings, parking lots, public roads and passenger railroads.)

and the nearest **residence** to T3 is 1,027 feet (319 Beckley Road, Norfolk).⁷³ The Council found the nearest **forested** property line to T3 is 321 feet (Skinner Road, Winchester).⁷⁴ The Council also found that industry setback standards for blade failure, ice throw, tower collapse, rotor sweep and falling objects are 1.1 times the total wind turbine height from objects of concern. The nearest **residence** to T3 is at a distance of 1.6 times the total wind turbine height.⁷⁵

Shadow Flicker: In its 2011 Final Decision, the Council found shadow flicker beyond a distance of 1.25 miles from the wind turbines would be negligible and one residence would experience shadow flicker over 30 hours per year (17 Flagg Hill Road, Colebrook).⁷⁶ The Council also found that industry standards for shadow flicker are 30 hours per year.⁷⁷ In its March 6, 2020 D&M Plan Modification approval, the Council confirmed shadow flicker beyond a distance of 1.25 miles from the wind turbines would be negligible and two off-site residences would experience shadow flicker of 31 hours per year (29A Flagg Hill Road, Colebrook) and 30.5 hours per year (8 Flagg Hill Road, Colebrook).⁷⁸ The residences on Beckley Road in Norfolk, including, but not limited to, the Gold residence, will not experience any shadow flicker due to their location southwest of T3.⁷⁹

Ice Throw: In its 2011 Final Decision, the Council found the ice throw probability at the nearest residence (29A Flagg Hill Road, Colebrook) to be nil based on a **site-specific ice risk assessment** for WCS.⁸⁰ The Council also found that all three turbines would meet the industry setback standards related to ice throw (1.1 times the total wind turbine height) and ordered BNE to establish an Ice Safety Management Plan (ISMP) in the D&M Plan.⁸¹ In its March 6, 2020 D&M Plan Modification approval, the Council found the ice throw probability at the nearest residence (319 Beckley Road, Norfolk) to be nil based on a **site-specific ice risk assessment** for T3.⁸² The Council also found that T3 would meet the industry setback standards related to ice throw (1.1 times the total wind turbine height) and ordered BNE to employ the Modified ISMP.⁸³

Noise: In its 2011 Final Decision, the Council found the predicted noise levels from all three wind turbines would range from 32-49 dBA and predicted noise levels at Residential Receptor Location 7 (319 Beckley Road, Norfolk) to be a maximum of 39 dBA.⁸⁴ The Council also found that noise emitted by WCS would meet DEEP allowable noise limits at the **nearest residential receptors**.⁸⁵ The post-construction noise measurement study for T1 and T2 concluded noise levels at Monitoring Location 3 (between the wind turbines and the property line of 319 Beckley Road, Norfolk) varied from approximately 36 dBA to 46 dBA.⁸⁶ Residential Receptor Location 7 (319 Beckley Road, Norfolk) is 1,265 feet further away from the wind turbines than Monitoring Location 3. Furthermore, T3 has the same maximum sound level as T1 and T2.⁸⁷ In its March 6, 2020 D&M Plan Modification approval, the Council found the predicted noise levels from all three wind turbines would range

⁷³ Petitioners focus on the setback from T3 to the property line of the Skinner Road parcel in Winchester owned by the Golds. That parcel is **forested** and does not host a residence or other “object of concern.”

⁷⁴ Initial T3 is 235 feet from the Nature Conservancy (TNC) property line. Revised T3 is 324 feet from TNC’s property line.

⁷⁵ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 7.

⁷⁶ Petition 983, *supra* note 1, FOF ¶127-138.

⁷⁷ *Id.* (30 total annual hours cumulative).

⁷⁸ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 8.

⁷⁹ *Id.*

⁸⁰ Petition 983, *supra* note 1, FOF ¶114-121.

⁸¹ *Id.*, D&O Condition 2i.

⁸² D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 8 (the site-specific ice risk assessment was conducted by the wind turbine manufacturer.)

⁸³ *Id.*

⁸⁴ Petition 983, *supra* note 1, Volume I, Attachment D; FOF ¶101 (In modeling noise, BNE assumed noise from 6 turbines.)

⁸⁵ *Id.*, Opinion at 5; *FairwindCT, Inc.*, *supra* note 6 at 701-704. (The Council is not required to follow state noise law.)

⁸⁶ *Id.*; (The reports and study conclude T1 and T2 operate at cumulative noise levels no greater than 49 dBA.)

⁸⁷ *Id.*, FOF ¶88; D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 9. (106 dBA.)

from 39-48 dBA and predicted noise levels at Residential Receptor Location 7 (319 Beckley Road, Norfolk) to be 45.4 dBA.⁸⁸ The Council also found that noise emitted by WCS would meet DEEP allowable noise limits at the ***nearest residential receptors***. In its March 6, 2020 D&M Plan Modification approval, the Council required performance of a post-construction noise monitoring protocol consistent with the existing protocol, employment of noise-reducing serrated wind turbine blades and operation of T3 in noise reduction mode, as necessary.

Visibility: In its 2011 Final Decision, the Council found WCS would be at least partially visible year-round from approximately 457 acres and seasonally visible (leaf off) from approximately 1,327 acres within a 5-mile radius. Areas along Route 44, Flagg Hill Road, Beckley Road, open areas and water bodies were determined to have year-round visibility of WCS.⁸⁹ In its March 6, 2020 D&M Plan Modification approval, the Council found T3 would be at least partially visible year-round from approximately 541 acres and seasonally visible (leaf off) from approximately 1,339 acres within a 5-mile radius.⁹⁰ In addition to the areas previously determined to have year-round visibility of WCS, areas along Greenwoods Turnpike, Beckley Pond and Beckley Bog, and open field areas along Beckley Road in Norfolk and Marchone Road in Winchester will also have year-round visibility of T3.⁹¹

Wetlands and Wildlife: In its 2011 Final Decision, the Council found WCS supports habitat for state-designated special concern reptile and amphibian species.⁹² The Council also found an opportunity to increase prime habitat for these species by ordering implementation of a Wetland and Wildlife Restoration Plan (WWRP) consistent with the 2002 Calhoun and Klemens Best Development Practices for Vernal Pools (C&K BDPs), that includes, but is not limited to, engagement of a third party environmental monitor and establishment of a conservation easement to protect natural resources.⁹³ The Council further found WCS supports habitat for birds and bats and ordered BNE to conduct ongoing studies and post-construction monitoring of bird and bat mortality for a period of three years after commencement of operation.⁹⁴ In its March 6, 2020 D&M Plan Modification approval, the Council found the amphibian population stable or increasing on the WCS site and the site in conformity with the WWRP.⁹⁵ The Council also found construction of T3 would be consistent with the 2015 U.S. Army Corps of Engineers Best Management Practices for Vernal Pools (USACE BMPs) and the existing WWRP, and reduce wetland disturbance by 45%.⁹⁶ The Council further found the average annual mortality rates of 6 birds and 4 bats over the three year post-construction study period at WCS to be significantly below the predicted average annual mortality rates of 40 birds and 113 bats.⁹⁷ The Council ordered BNE to retain a third party environmental monitor, conduct ongoing studies and post-construction monitoring of bird and bat mortality for a period of three years after commencement of T3 operation and employ the T3 bat protection feature, as necessary.⁹⁸

⁸⁸ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 8-9.

⁸⁹ Petition 983, *supra* note 1, FOF ¶174-189 (SHPO determined WCS would have no adverse effect on historic resources.)

⁹⁰ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 11-12.

⁹¹ *Id.*; *Mayer v. Historic District Commission*, 325 Conn. 765, 771 (2017) (possibility that applicants will enlarge their home and adversely affect the plaintiffs' waterfront view is not a proper consideration for the court or the commission in the absence of proof that plaintiffs have a legal right to restrict what the applicants can do with their property within applicable land use laws and regulations.); *New Haven v. United Illuminating Co.*, 168 Conn. 478, 495 (1975) (Property owners have no right to an unobstructed view from structures built on an adjacent property. The only exception is where there is an express statutory provision or there is a contract or restrictive covenant protecting the private right to a view or vista.)

⁹² Petition 983, *supra* note 1, FOF ¶151-152 (including Jefferson salamander, smooth green snake and eastern ribbon snake.)

⁹³ *Id.*, FOF ¶153,194 and Opinion at 3 (Klemens is the third party environmental monitor. The easement is in favor of the Northwest Connecticut Sportsmen's Association, the abutting property owner to the north.)

⁹⁴ *Id.*, FOF ¶155-173 and D&O Condition 4.

⁹⁵ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 3,10.

⁹⁶ *Id.* at 11 (Access to the initial T3 location required 4,250 square feet of disturbance within the wetland boundary.)

⁹⁷ *Id.* at 3, 11.

⁹⁸ *Id.* at 11 (the bat protection feature can be installed post-construction).

Contrary to Petitioners' assertions that the Council "took their property without due process," in compliance with Condition 2 of the Council's Final Decision, BNE submitted a detailed site plan demonstrating the location and rotor diameter of T3 ensures the rotating blades are confined to the host property by a distance of 1.1 times the length of the blade from property lines.⁹⁹ Further contrary to Petitioners' assertions that they were "suddenly thrust into Petition 983 at the end stage," the Supreme Court clearly stated in *FairwindCT, Inc.* that the parties are not without recourse if they can show that the revised plans do not comply with the substantive requirements of the Final Decision. The parties may file a petition for a declaratory ruling claiming the project is not in compliance with the terms of approval or bring another type of legal action.¹⁰⁰ The Supreme Court expressed no opinion as to whether the parties would have standing to raise any of these claims or, if so, whether they could ultimately prevail.¹⁰¹

A central purpose of PUESA is to balance competing interests. A central purpose of the UAPA is to prevent piecemeal appeals.¹⁰² In *City of Torrington v. Connecticut Siting Council (City of Torrington)*, the City appealed the Council's final decision to approve a wood-burning electric generating facility on the same bases claimed in *FairwindCT, Inc.* and the same bases claimed in the Petition.¹⁰³ The Council issued a permit for the facility subject to a number of conditions precedent and subsequent to the construction and operation of the facility - a number of conditions that must be met before it can begin construction of the facility, a number of conditions that must be met before it can begin operation and a number of conditions that must be met to continue operation.¹⁰⁴ The City argued that postponing discussion of certain issues until after the Council's final decision violated due process rights.¹⁰⁵ The Superior Court concluded that the Council has exclusive jurisdiction over energy facilities in the state and is clearly authorized to issue a permit on such terms, conditions, limitations or ***modifications of the construction or operation of the facility*** as the Council deems appropriate (Emphasis added.)¹⁰⁶ Contrary to the assertions of the City, the Council ordered appropriate conditions.¹⁰⁷ By ordering a D&M Plan to be provided to the service list, interested persons will have notice and an opportunity to be heard on matters of concern that were raised during the proceedings.¹⁰⁸ Therefore, the Council did not violate due process rights.

Similar to the circumstances in *City of Torrington*, the Council issued its June 2, 2011 Final Decision for WCS subject to a number of conditions precedent and subsequent to the construction and operation of the facility - a number of conditions that must be met before it can begin construction of the facility, a number of conditions that must be met before it can begin operation and a number of conditions that must be met to continue operation. In its appeal, Fairwind argued that postponing discussion of certain issues until after the Council's Final Decision violated due process rights. In reaching the same conclusion as the Superior Court in *City of Torrington* that the conditions imposed by the Council were appropriate, the Supreme Court found in *FairwindCT, Inc.*, "***Most significantly, the Council ordered a D&M Plan.***"¹⁰⁹ By ordering a D&M Plan to be provided to the service list, interested persons will have notice and an opportunity to be heard on matters of concern that were raised during the proceedings. Interested persons, including, but not limited to, the Petitioners, had notice and an opportunity to be heard on BNE's January 9, 2020 D&M Plan Modification. The Council approved BNE's January 9, 2020

⁹⁹ Petition 983, *supra* note 1, January 9, 2020 D&M Plan Modification, Response to Council Interrogatory 24.

¹⁰⁰ *FairwindCT, Inc.*, *supra* note 6 at 694-697 (the subject Petition, a nuisance action or a CEPA action).

¹⁰¹ *Id.* at 695, footnote 28.

¹⁰² *Town of Killingly*, *supra* note 51 at 523.

¹⁰³ *City of Torrington*, *supra* note 54 (the Council lacked jurisdiction; the Council violated PUESA; the Council violated due process rights; and the Council violated CEPA).

¹⁰⁴ *Id.* at *20-21.

¹⁰⁵ *Id.* at *21-23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *25.

¹⁰⁸ *Id.*

¹⁰⁹ *FairwindCT, Inc.*, *supra* note 6 at 686.

D&M Plan Modification subject to the same conditions ordered by the Council in its June 2, 2011 Final Decision. Approval of BNE's January 9, 2020 D&M Plan Modification did not violate Petitioners' due process rights.

D. Approval of the change in structure type and location of T3 did not violate CEPA.

Petitioners seek a declaratory ruling that the change in structure type and location of T3 will unreasonably destroy or impair the public trust in the natural resources of the state in violation of CEPA, which states, "***In any administrative, licensing or other proceeding***,... any person may intervene as a party on the filing of a verified pleading asserting that the ***proceeding*** 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." (Emphasis added). Fairwind was a party and a CEPA intervenor to the ***proceedings*** held on Petition 983. Fairwind appealed the Council's Final Decision. The Supreme Court found in *FairwindCT, Inc.* that the Council is not required to consider CEPA or to deny petitions that are in conflict with CEPA.¹¹⁰ The Supreme Court further found "plaintiffs lack standing as [CEPA] intervenors because the ***conditions*** [that the Council imposed on its approval of BNE's petition] do not have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."¹¹¹ (Emphasis added). The D&M Plan is a ***condition*** the Council imposed on its approval of BNE's petition.¹¹²

In *Burton v. Dominion Nuclear Conn., Inc.*, a resident who participated in the underlying proceedings as an intervenor, appealed the approval of a 7 percent increase in a facility's electric generating capacity (uprate) under CEPA claiming the uprate will increase the temperature of the facility's thermal plume and cause unreasonable pollution.¹¹³ The Supreme Court found the claim did not contain allegations of "pollution in excess of that permitted under the regulatory scheme" and held, "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme."¹¹⁴ PUESA is an environmental legislative and regulatory scheme that specifically governs the conduct Petitioners claim constitutes an unreasonable impairment under CEPA. In its 2014 decision in *FairwindCT, Inc.*, the Supreme Court held the Council's approval of the construction, maintenance and operation of WCS complies with PUESA.

Petitioners allege the Council violated its obligations under CEPA and PUESA by approving BNE's January 9, 2020 D&M Plan Modification because information with respect to wildlife is lacking, the site plans are inadequate to protect wetlands and the wetland crossing merits USACE review. In addition to a change in structure type or location, RCSA §16-50j-62(b) allows for a change in the location of a wetland or watercourse crossing and a change in the location of an access way or structure in a regulated wetland and watercourse area. Condition 2 of the Council's June 2, 2011 Final Decision, Condition 3 of the Council's March 6, 2020 D&M Plan Modification approval and DEEP's General Permit for the Discharge of Stormwater and Dewatering Wastewaters

¹¹⁰ *Id.* at 702; CGS §16-50x (2019).

¹¹¹ *Id.* at 688-689.

¹¹² *City of New Haven v. Conn. Siting Council*, 2002 Conn. Super. LEXIS 2753 at *43-56 (Conn. Super. 2002) (In an appeal of an approval of a submarine electric transmission cable, the court held that while the Council has discretion to consider CEPA, it is not required to do so. The court also held the Council is not required to consider the Connecticut Environmental Policy Act, which is separate and distinct from CEPA, requires an environmental impact statement and applies only to "activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state."); See also *Conn. Energy Marketers Ass'n v. Dept. of Energy and Environmental Protection*, 324 Conn. 362 (2016) and *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 63 (1981).

¹¹³ *Burton v. Dominion Nuclear Conn., Inc.*, 300 Conn. 542, 557-559 (2011).

¹¹⁴ *Id.*

from Construction Activities (General Permit) issued for WCS require retention of a third party inspector to monitor on-site erosion and sedimentation controls and retention of a third party monitor to ensure establishment of appropriate environmental safeguards protective of amphibian and reptile species during construction.¹¹⁵

Dr. Michael W. Klemens (Klemens), co-author of the C&K BDPs, is the third party environmental monitor of record at WCS.¹¹⁶ In his March 13, 2011 pre-filed testimony, Klemens summarized his over thirty years of Connecticut-specific field experience that includes surveying, assessing and mitigating impacts to wetland-dependent amphibians and reptiles, and described his involvement in WCS as undertaking studies to identify potential vernal pools, and to survey stream and seepage areas, particularly those proposed to be crossed by the access road, and based on the results of those surveys, “suggest appropriate mitigation or redesign if biologically warranted.”¹¹⁷

In support of its claim that BNE’s January 9, 2020 D&M Plan Modification violates CEPA, Petitioners submitted a report authored by REMA Ecological Services, LLC (REMA) that makes the following six claims:

1. Wetland delineations are incomplete;
2. Wetland delineations are not substantiated or verified;
3. Wetland inventory and characterization is lacking;
4. A productive vernal pool habitat was missed;
5. Potential habitat for the threatened spring salamander occurs along the riparian wetland corridor; and
6. The plans do not afford protection of vernal pool habitat.

In support of Claim 1, REMA states that the outlet for proposed Stormwater Renovation Area B would be located “within or close to” a wetland that is not delineated. In its January 9, 2020 D&M Plan Modification, consistent with Condition 2 of the Council’s June 2, 2011 Final Decision, BNE submitted an Erosion Control Plan, Stormwater Management Plan, Stormwater Pollution Control Plan (SWPCP), Drainage Calculations and provisions for crossing the wetland. The proposed Stormwater Renovation Area basins are sized to accommodate the entire water quality volume below the outlet invert and designed for infiltration in compliance with the *2002 Connecticut Guidelines for Soil Erosion and Sedimentation Control* and the *2004 Stormwater Quality Manual*.¹¹⁸ Further review by the Council, DEEP and USACE will identify the extent of buffers to any wetlands. Condition 1 of the Council’s March 6, 2020 D&M Plan Modification approval requires “submission of a final site plan that includes, but is not limited to, details for crossing Wetland 1, extent of vegetative clearing, grading, wetland buffers, access roads, turbine foundation, equipment and material laydown and staging area, electrical interconnection, fencing, equipment pad, and post-construction stormwater controls, as designed in the DEEP-approved SWPCP.” Condition 2 requires “submission of the DEEP General Permit and DEEP-approved SWPCP prior to commencement of construction.” It is within the Council’s statutory authority to approve a facility subject to a condition that requires subsequent compliance with DEEP standards and regulations.¹¹⁹

In support of Claim 2, REMA states that the site plans erroneously depict a “disconnect” between wetlands to the north and south of the access road, northeast of the bridge crossing, that understates BNE’s wetland activity. REMA’s position is based on a topographic map review rather than an in-field verification. During the proceedings held on Petition 983, BNE submitted a Terrestrial Wildlife Habitat and Wetland Impact Analysis (TWHWIA) that substantiated BNE’s wetland activity for the initial location of T3 utilizing delineated on-site

¹¹⁵ D&M Plan Modification Decision and Staff Report, March 6, 2020, *supra* note 4 at 11.

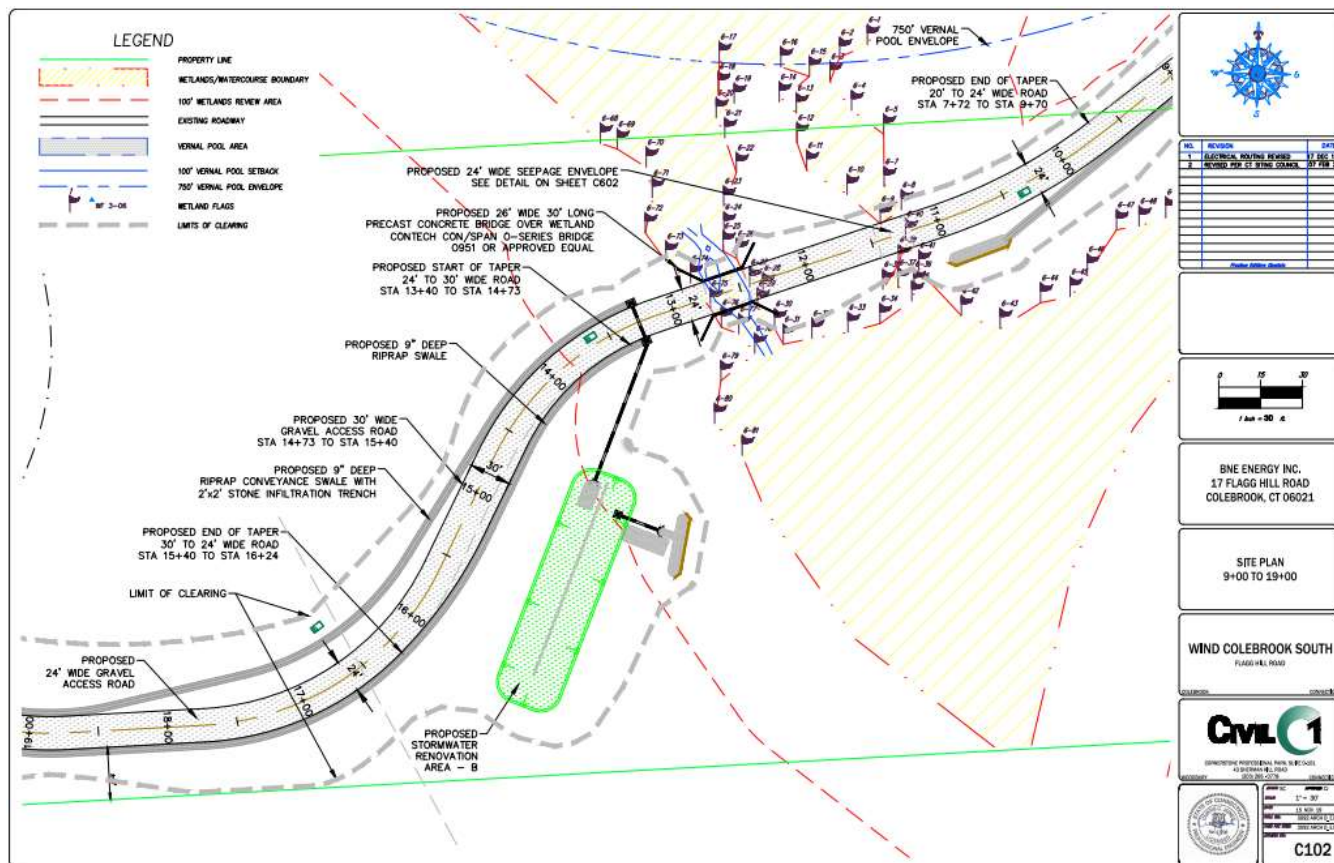
¹¹⁶ Petition 983, *supra* note 1, Partial D&M Plan approval, October 21, 2011.

¹¹⁷ *Id.*, Pre-Filed Testimony of Michael W. Klemens, March 13, 2011.

¹¹⁸ *Id.*, January 9, 2020 D&M Plan Modification, Response to Council Interrogatory 57, Sheet C602.

¹¹⁹ *FairwindCT, Inc.*, *supra* note 6 at 687; *Preston*, *supra* note 35 at 491-2; *City of Torrington*, *supra* note 54 at *22-25.

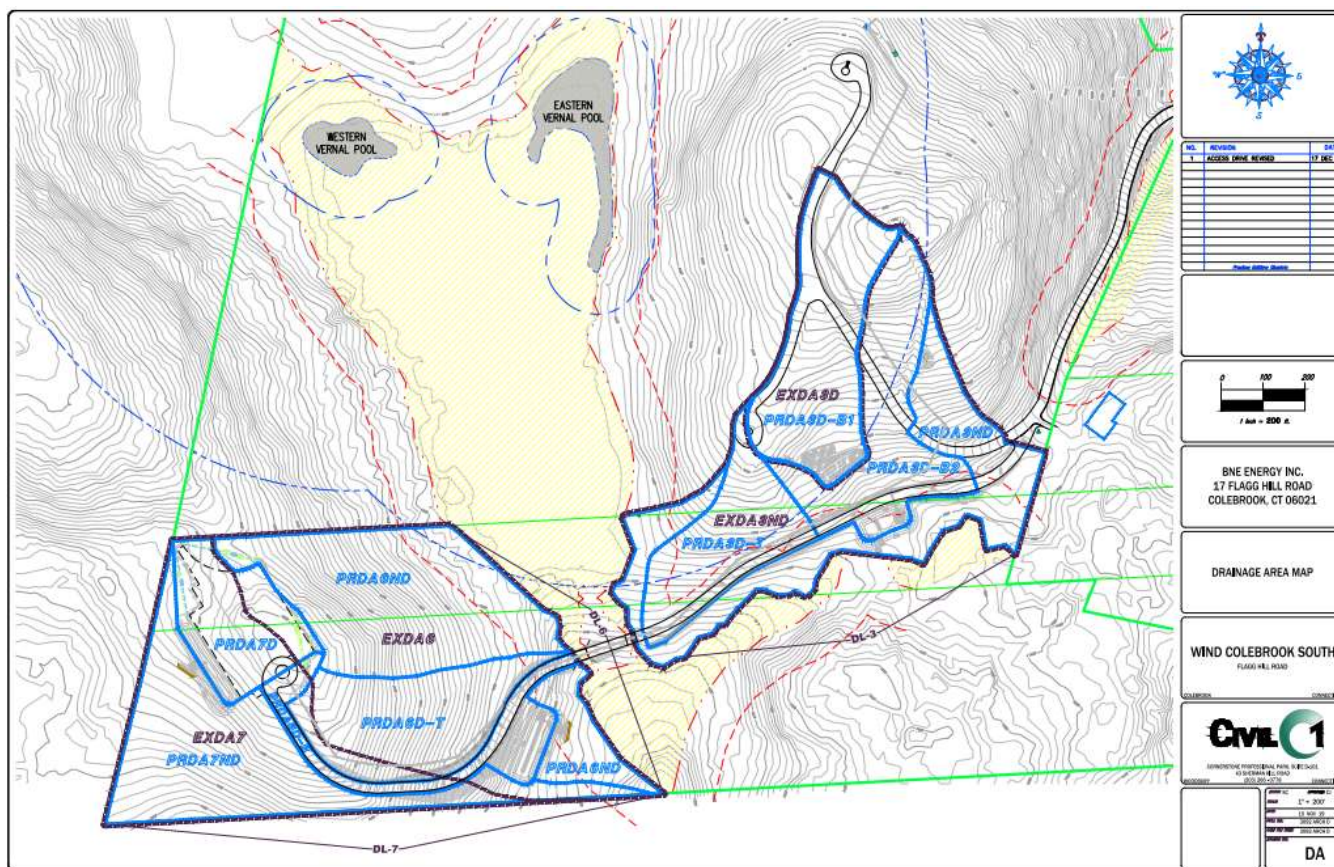
wetland boundaries and identified off-site DEEP wetlands.¹²⁰ In its January 9, 2020 D&M Plan Modification, BNE submitted site plans that demonstrate the wetlands in the area referenced by REMA have been field-delineated with wetland flagging, which indicate a disconnection between the wetlands to the north and south of the access road, northeast of the bridge crossing. Furthermore, based on wetland flagging, these wetlands do have connectivity at the location of the bridge crossing. See Sheet C102 below.



Also in its January 9, 2020 D&M Plan Modification, consistent with Condition 2 of the Council's June 2, 2011 Final Decision, BNE submitted an Erosion Control Plan, Stormwater Management Plan, SWPCP, Drainage Calculations and provisions for crossing the wetland that depict connectivity between wetlands to the north and south of the access road at the location of the bridge crossing that substantiate BNE's wetland activity for the revised location of T3.¹²¹ See Drainage Area Map below. Note the connectivity between the wetlands to the north and south of the access road at the location of the bridge crossing. See also Sheet C600 of BNE's January 9, 2020 D&M Plan Modification that describes the Erosion Control and Construction Sequence in detail.

¹²⁰ Petition 983, *supra* note 1, FOF ¶199 (direct wetland impacts of 4,702 square feet.); DEEP and UCONN, Connecticut Environmental Conditions Online Map Catalogue, Inland Wetland Soils, Town of Colebrook, *available at* http://cteco.uconn.edu/maps/town/SoilWet/SoilWet_Colebrook.pdf

¹²¹ D&M Plan Modification Decision and Staff Report, *supra* note 4 at 11 (direct wetland impacts of 2,320 square feet.)



In support of Claim 3, REMA remarks natural resource information is lacking and references the Petition 983 TWHWIA. However, REMA ignores all of the post-construction and ongoing wildlife studies at WCS that confirm the TWHWIA conclusion that “construction activities associated with the installation of the proposed project are primarily expected to have a short-term impact on terrestrial wildlife.”¹²² REMA also notes several avian species observations during its field investigation “on the subject site.”¹²³ All of the avian species observed by REMA were surveyed and inventoried in BNE’s Breeding Bird Surveys and ongoing bird surveys conducted in accordance with Condition 4 of the Council’s Final Decision, including, but not limited to, spring and fall raptor migration surveys and spring, summer and fall songbird breeding and migration surveys.¹²⁴ Condition 7 of the Council’s March 6, 2020 D&M Plan Modification approval requires, “Performance of post-construction monitoring of bats and birds consistent with the existing WCS protocol to document any mortality from T3 operations.” In further support of its claim, REMA specifically notes observation of the “uncommon” though not state-listed “drumming rough grouse.” According to the DEEP Wildlife Division, the non-migratory ruffed grouse has a widespread range and is an important *game bird*.¹²⁵ A game bird is hunted for sport or food. The Northwestern Connecticut Sportsmen’s Association owns the property abutting WCS to the north and holds a conservation easement at WCS pursuant to Condition 2 of the Council’s June 2, 2011 Final Decision.

¹²² *Id.*, Volume 3, Appendix I at 17; D&M Plan Inspection and Monitoring Reports.

¹²³ There is no indication that the property owners of “the subject site” provided consent for REMA to enter the property.

¹²⁴ Petition 983, *supra* note 1, D&M Plan, September 16, 2011.

¹²⁵ DEEP Wildlife Division, Ruffed Grouse, available at <https://portal.ct.gov/DEEP/Wildlife/Fact-Sheets/Ruffed-Grouse>.

In support of Claim 4, REMA identifies a vernal pool habitat “embedded in the riparian wetland corridor” that “appears to straddle” the boundary between WCS and the forested property owned by the Golds.¹²⁶ REMA opines that “according to [C&K BDPs], this is a cryptic vernal pool and would receive a Tier I designation,” but REMA provides no supporting data. Cryptic vernal pools are found within larger wetland systems. In its June 2, 2011 Final Decision, the Council expressly found WCS supports habitat for state-listed reptile and amphibian species and presents an opportunity to increase prime habitat for these species by implementation of a WWRP.¹²⁷ REMA notes wood frog egg mass observations, but no spotted salamander egg mass observations during its April 8, 2020 field visit. Wood frogs and spotted salamanders are common species. These observations confirm the conclusions in Klemens’ Post-Construction Amphibian Monitoring Reports that the spotted salamander population is stable and the wood frog population is increasing on the WCS site.¹²⁸ Condition 3 of the Council’s March 6, 2020 D&M Plan Modification approval requires “retention of a third party monitor to ensure establishment of appropriate environmental safeguards protective of amphibian and reptile species during construction consistent with Note 5 under “WCS Third Party Environmental Inspections” on Sheet C600 of BNE’s January 9, 2020 D&M Plan Modification.

In support of Claim 5, REMA claims there is potential habitat for the threatened spring salamander “in the general vicinity of the site” that occurs along the riparian wetland corridor and cites Klemens’ April 20, 2011 Herpetological Assessment (HA). REMA quotes Klemens’ HA as stating, “all construction activities near to or draining into this stream should pay special attention to the adverse effects of siltation to this delicate system and to the spring salamander, *there should not be any crossing of this stream corridor...*” REMA conveniently omits the remainder of the quoted sentence, which specifically states, “...*there should not be any crossing of this stream corridor between [Cryptic Vernal Pool 1-B (CVP 1-B) and CVP 1-C].*” These cryptic vernal pools are embedded in the northwestern lobe of Wetland 1 near the confluence of a perennial watercourse. CVP 1-B is located on-site, while CVP 1-C is located off-site on property owned by the Nature Conservancy. The referenced stream corridor is not near the revised T3 location. See Attachment 5. In his March 13, 2011 pre-filed testimony in Petition 983, Klemens announced that his “goal is to determine the presence of the spring salamander, either by direct documentation, or the determination of appropriate habitat.”¹²⁹ If there is appropriate habitat for the spring salamander along the riparian wetland corridor, Klemens will certainly find it, document it and protect it.

In support of Claim 6, REMA claims vernal pool habitat will be vulnerable to siltation during and after construction of the access road and stormwater features due to topography and proximity. Contrary to REMA’s representations, design considerations recommended by Klemens, including, but not limited to, utilization of swamp mats for a temporary wetland crossing and installation of syncopated silt fence and amphibian barriers around the entirety of the temporary sediment basins, are incorporated into the plans.¹³⁰ The site plan specifies the installation of an arch bridge with a 30 foot span across the wetland stream in the area where the wetland is at its narrowest point. The arch bridge is designed with headwalls, wing walls, and footings that are all located outside of the streambed and provide the minimum disturbance possible to the wetlands and watercourse.¹³¹ USACE Stream Crossing BMPs require spans be sized at least 1.2 times wider than the bank full stream width and strongly prefer spans as they avoid or minimize disruption to the streambed.¹³² Utilization of the arch bridge with

¹²⁶ This is also the boundary between the Towns of Colebrook and Winchester.

¹²⁷ Petition 983, *supra* note 1, FOF ¶¶151-152 (Jefferson salamander, smooth green snake and eastern ribbon snake).

¹²⁸ Petition 983, *supra* note 1, D&M Plan Inspection and Monitoring Reports (Site visits conducted May 3, 2014, *with assistance from Council staff*, and April 29, 2015).

¹²⁹ Petition 983, *supra* note 1, Pre-Filed Testimony of Michael W. Klemens, March 13, 2011. (Without trespassing).

¹³⁰ *Id.*, D&M Plan, Klemens Report, September 15, 2011; D&M Plan Modification Plan Sheet C602; C300-C303.

¹³¹ *Id.*, January 9, 2020 D&M Plan Modification, Response to Council Interrogatories 39-40.

¹³² This is also consistent with the Connecticut DEEP Stream Crossing Guidelines, February 26, 2008, *available at* <https://portal.ct.gov/-/media/DEEP/fishing/restoration/StreamCrossingGuidelinespdf.pdf>

a 30 foot span across the wetland stream preserves the natural stream bed and slope, prevents blockage from debris and allows riverine wildlife to pass without constriction.

In its conclusion, REMA recommends that the USACE review the proposal. On September 18, 2020, USACE informed BNE the permit issued in 2012 authorizing construction of the access road for the initial T3 location expired and a permit authorizing construction of the access road for the revised T3 location is required.¹³³ Pursuant to Condition 1 of the Council's June 2, 2011 Final Decision, BNE is required to provide a copy of all permits issued by any applicable federal and state regulatory agencies concerning the proposed project, when available. This includes any USACE permit. Pursuant to Condition 2 of the Council's March 6, 2020 D&M Plan Modification approval, BNE is also required to provide a copy of the DEEP General Permit and the DEEP-approved SWPCP prior to commencement of construction. The issuance of the USACE and DEEP permits will ensure there are no construction-related impacts to on-site and off-site water quality.

Contrary to the representations of Petitioners, the Council gave adequate consideration to environmental issues.¹³⁴ The Council's March 6, 2020 D&M Plan Modification approval did not violate CEPA.

E. Approval of the change in structure type and location of T3 did not violate state noise law.

Petitioners claim the sound report submitted with BNE's January 9, 2020 D&M Plan Modification doesn't comply with DEEP Noise Control Standards and the Council's Wind Regulations. In support of their position, Petitioners' resubmitted a 2016 review commissioned by Fairwind (2016 Rand Review) of the Post-Construction Noise Study submitted by BNE in compliance with Condition 2 of the Council's June 2, 2011 Final Decision for compliance with the DEEP Noise Control Standards.

In its June 2, 2011 Final Decision, the Council found, "On balance, the Council is satisfied that noise emitted by the project would meet Connecticut DEEP allowable limits *at the nearest residential receptors*." (Emphasis added).¹³⁵ Contrary to the representations of Petitioners and the assertions in the 2016 Rand Review, the Supreme Court concluded in *FairwindCT, Inc.* that the Council has the authority to find that a reasonable approach to noise pollution was to measure it at residences rather than property lines.¹³⁶ Pursuant to CGS §16-50x, "Notwithstanding any other provision of the general statutes, the Council shall have exclusive jurisdiction over the location and type of modifications of facilities... and in ruling on applications for certificates and petitions for declaratory rulings for facilities... *the Council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate*..." (Emphasis added).

The Supreme Court stated in *FairwindCT, Inc.*, "It is simply impossible to interpret [CGS §16-50x] as *requiring* the Council to consider state laws outside of [PUESA] when ruling on petitions for declaratory rulings, and the plaintiffs have pointed to nothing in [PUESA] that requires the Council to deny petitions that do not comply with state noise law."¹³⁷ The Supreme Court concluded that the Council is authorized under PUESA to approve facilities even if they do not comply with state laws outside of PUESA, including, but not limited to, state noise law, and concluded that the Council's Wind Regulations do not apply to WCS nor are they retroactive.¹³⁸ In their appeal, *Fairwind conceded the Council's Wind Regulations are not retroactive*.¹³⁹

¹³³ Petition 983, *supra* note 1, January 9, 2020 D&M Plan Modification, September 8, 2020 USACE correspondence.

¹³⁴ *FairwindCT, Inc.*, *supra* note 6 at 713; *Burton v. Conn. Siting Council*, 161 Conn. App. 329, 341 (Conn. App. 2015).

¹³⁵ Petition 983, *supra* note 1, Opinion at 5.

¹³⁶ *FairwindCT, Inc.*, *supra* note 6 at 698.

¹³⁷ *Id.* at 703.

¹³⁸ *Id.* at 701-704. (The Council is not required to follow state noise law.)

¹³⁹ *Id.* at 700-701.

To the extent that Petitioners claim compliance with DEEP Noise Control Standards at the nearest residential receptors violates CEPA, CGS §16-50x does not *require* the Council to consider those provisions or to deny petitions that are in conflict with them.¹⁴⁰ Consistent with its June 2, 2011 Final Decision, in its March 6, 2020 D&M Plan Modification approval, the Council found T3 would comply with the DEEP Noise Control Standards ***at the nearest residential receptors***. T3 has the same maximum sound level as T1 and T2.¹⁴¹ Condition 6 of the Council's March 6, 2020 D&M Plan Modification approval requires BNE to perform a post-construction noise monitoring protocol consistent with the existing WCS noise monitoring protocol and upon review of the noise study, "the Council will evaluate and determine if any mitigation measures should be employed, including turbine operations management." The Council's March 6, 2020 D&M Plan Modification approval did not violate state noise law.

IV. Conclusion

A central purpose of the UAPA is to prevent piecemeal appeals.¹⁴² It would be absurd and contrary to the purposes of the UAPA and PUESA for the Council to reopen final decisions each time property ownership changes after a facility is approved and operational. The history of WCS demonstrates the Council's continuing fulfillment of its statutory charge under PUESA to support the policies of the state, minimize environmental impacts and encourage technological advancements, including, but not limited to, methodical upgrades, in the construction, maintenance and operation of electric generating facilities in the state. In 1999, the Council rendered its Towantic final decision subject to a D&M Plan condition. In 2002, the Superior Court rejected all of the Towantic opponents' arguments in opposition to the Towantic D&M Plan. It held the Council's final decision was affirmed in the case of *Citizens for the Defense of Oxford* and cannot now be challenged on its decision not to require relocation of the facility from its initial location a condition of the D&O. The new site plans and locations of associated equipment in the D&M Plan were consistent with the Council's final decision, consistent with state policy and protective of the environment.

Similar to the Towantic opponents, Petitioners essentially seek a re-trial of the WCS proceedings by repackaging the same arguments rejected by the Supreme Court in Fairwind's appeal of the Council's Final Decision.¹⁴³ In 2011, the Council rendered its WCS Final Decision subject to a D&M Plan condition. In 2012, the Superior Court rejected all of Fairwind's arguments in opposition to the WCS D&M Plan. In 2014, the Supreme Court rejected all of Fairwind's arguments in opposition to the WCS D&M Plan. It held not only that Fairwind had no substantial rights in the D&M Plan, but that Fairwind also lacked standing to contest the D&M Plan and lacked standing under CEPA.¹⁴⁴ The Supreme Court stated, "Nothing in the record of this case showed specific, personal interests that were affected by the conditions that the Council imposed on its approval. The conditions imposed no costs or burdens on them."¹⁴⁵

In its 2014 decision in *FairwindCT, Inc.*, the Supreme Court determined that:

A. the Council has jurisdiction over wind electric generating facilities;

¹⁴⁰ *Id.* (CGS §16-50x authorizes the Council to *consider* the provisions of CEPA.)

¹⁴¹ Petition 983, *supra* note 1, FOF ¶88; D&M Plan Modification Staff Report and Decision, March 6, 2020, *supra* note 4 at 9

¹⁴² *Town of Killingly*, *supra* note 51 at 523 (1991).

¹⁴³ *Rosa v. Conn. Siting Council*, 2007 Conn. Super. LEXIS 590 at *18-19 (Conn. Super. 2007); *Nobs v. Conn. Siting Council*, 2000 Conn. Super. LEXIS 1156 at *14 (Conn. Super. 2000) (Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of fact and whether the conclusions drawn from those facts are reasonable.)

¹⁴⁴ *FairwindCT, Inc.*, *supra* note 6 at 688.

¹⁴⁵ *Id.* at 688-689.

- B. the Council has statutory authority to condition a declaratory ruling with a D&M Plan;
- C. the Council did not violate due process rights;
- D. the Council did not violate CEPA; and
- E. the Council did not violate state noise law.¹⁴⁶

The Supreme Court decision affirmed the legal sufficiency and application of the Council's Energy Facility D&M Plan regulations, including, but not limited to, staff approval of significant changes to an approved D&M Plan under RCSA §16-50j-62 that are specifically defined as:

- 1. the location of a wetland or watercourse crossing;
- 2. the location of an access way or a structure in a regulated wetland or watercourse area; and
- 3. a change in structure type or location.

Consistent with Council precedent and the judicial decisions in *FairwindCT, Inc.* and *Town of Middlebury*, BNE's new site plans and location for T3 in its January 9, 2020 D&M Plan Modification are consistent with the Council's Final Decision, consistent with state policy and protective of the environment.

In its June 2, 2011 Final Decision, the Council approved the construction, maintenance and operation of **three** wind turbines at WCS. On August 31, 2018, the Council extended the deadline for construction of T3. The state energy policy includes the goal to "develop and utilize renewable energy sources, such as solar and wind energy, to the maximum practicable extent."¹⁴⁷ The 2018 Comprehensive Energy Strategy includes growth of renewable and zero carbon generation in the state and region.¹⁴⁸ Governor Lamont's 2019 Executive Order No. 3 calls for the complete de-carbonization of the electric sector by 2040.¹⁴⁹

Wind is a zero carbon resource. WCS is the only existing, utility-scale wind electric generating facility in the state. It is capable of incorporating a battery storage component in the future.¹⁵⁰ T3 was selected in a DEEP Small-Scale Clean Energy Request for Proposals.¹⁵¹ The revised location of T3 reduces wetland disturbance associated with construction by 45%; incorporates design standards consistent with the *2002 Erosion and Sedimentation Controls*, the *2004 Stormwater Quality Manual*, the C&K BDPs, the USACE BMPs, and the USACE and DEEP Stream Crossing Guidelines; and requires a DEEP General Permit and a USACE Permit to ensure there are no on-site or off-site water quality impacts and to protect reptile and amphibian habitat.

BNE's January 9, 2020 D&M Plan Modification was properly submitted under the Council's Energy Facility D&M Plan Regulations and the Council's approval of BNE's January 9, 2020 D&M Plan Modification does not conflict with the Council's June 2, 2011 Final Decision on Petition 983. Therefore, pursuant to CGS §4-176, the Supreme Court's 2014 decision in *FairwindCT, Inc.*, the Council's 2011 Final Decision on Petition 983, and RCSA §16-50j-62(b), the Council should deny the Petition.

¹⁴⁶ *FairwindCT, Inc.*, *supra* note 6 at 688.

¹⁴⁷ CGS §16a-35k (2019).

¹⁴⁸ 2018 Comprehensive Energy Strategy for Connecticut, February 8, 2018, *available at* http://www.ct.gov/deep/lib/deep/energy/ces/2018_comprehensive_energy_strategy.pdf

¹⁴⁹ Governor Lamont's Executive Order No. 3, *available at* <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-3.pdf?la=en&hash=F836ED64F1BB49A5424AB4C7493A3AE3>.

¹⁵⁰ Petition 983, *supra* note 1, January 9, 2020 D&M Plan Modification, Response to Set 2 Interrogatory No. 2.

¹⁵¹ DEEP Small Scale Clean Energy RFP, Project Selection, November 28, 2016, *available at* <http://mediad.publicbroadcasting.net/p/wnpr/files/201611/energyrfsmall11-28-16.pdf>; CGS §16-1(a)(48) (2019).

Attachment 1 – 2010 Former Owner of 319 Beckley Road, Norfolk comments on Petition 983

Fontaine, Lisa

From: Beth Crossman [bethcrossman@verizon.net]
Sent: Monday, December 27, 2010 1:53 PM
To: CSC-DL Siting Council
Subject: proposed wind turbines

To: Connecticut State Siting Council

We strongly support a one year moratorium on the construction of the proposed wind turbines in order to debate and establish regulations covering the installation of large commercial wind turbines in residential areas.

/s/ Patrick F. Crossman, 319 Beckley Road, PO Box 175, Norfolk, Ct

06058

Elizabeth D. Crossman, 319 Beckley Road, PO Box 175, Norfolk, CT

06058

Attachment 2 – January 27, 2020 Gold comments on D&M Plan Modification (without attachments)

Julia and Jonathan Gold
319 Beckley Road
Norfolk, CT 06058

January 27, 2020

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

Re: Petition No. 983

Dear Ms. Bachman:

We are writing to express significant concerns regarding Petition 983, BNE Energy, Inc.'s ("BNE") [1/9/2020] request for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is required for the Development and Management Plan Modification ("Modification"). The newly designed, enlarged, reconfigured and relocated wind turbine described in the Modification is proposed to be located adjacent to our property at 319 Beckley Road in Norfolk, CT. Despite the proposed location of the project in proximity to our property, no one from BNE has contacted us regarding the Modification.

Although BNE claims "the requested modification would not constitute a significant change or alteration in the general physical characteristics of the facility," the details of the Modification indicate otherwise. In fact, the Modification is fundamentally different in size, scope, operation and location. It employs new technology—in particular, a much taller turbine—at a new site a significant distance from the originally approved location, and it requires the development of new road and bridge infrastructure with significant impact to the surrounding environment. As such, the Modification is a new wind development project that should therefore be subject to all current standards and review procedures. It would appear that the Connecticut Siting Council ("Council") agrees with this conclusion by its letter of January 24, 2020 requesting responses to 53 Interrogatories ("Council Interrogatories") covering the full range of project considerations. If the Modification was not a fundamentally new project, the information sought by the Council Interrogatories would not be needed for the Council to render a decision.

Our concerns stem from this project's apparent lack of compliance with the current regulatory framework. The proposal also contains what appear to be a number of misrepresentations of assessment and specifications, unsubstantiated claims, and missing information. An initial,

partial list of these concerns, some of which may be covered by the Council's Interrogatories, are set forth below:

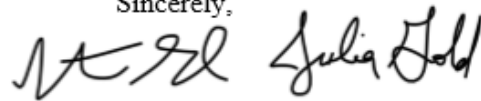
- BNE has not contacted us, the closest abutters to the proposed site.
- CSC Wind Regulations require a setback of 1.5 times the height of the turbine from abutting property lines. As noted in the Council Interrogatories, BNE has not included property line measurements in their documentation. Rather, they have included the distance from our **home** (1,027 ft/ 313 meters). To comply with CSC regulations, the turbine would need to be at least 969 ft/ 295.5 meters away from our **property line**, a considerable distance away.
- The Modification would substantially limit our ability to use our property safely, ultimately constituting a taking. We regularly spend time in this part of our woods and this proposal puts us and our family, including our Deaf son with significant special needs, at considerable risk from ice throw or potential falling objects. BNE's submission of GE's setback requirements clearly states the potential risk of any regularly used abutting property closer than 170 meters.
- In attempting to justify the new site, the Modification refers to the new turbine being "further away in the woods" and "further away from the closest point to Route 44" without any mention of the new site's proximity to our property. Our property has many unique features that must be considered as part of the Council's review of the Modification including the following:
 - A barn between our home and the proposed site which we plan to develop as a residential space
 - A campsite close to the turbine site
 - Recreation spaces for our family and friends
- The Modification claims "no other adverse material effects" with no indication of what that means or how BNE came to that conclusion.
- The Modification claims minimal visual impact and indicates that "the Project has not received any complaints regarding visual impacts, shadow flicker, or ice drop," but the attached letters belie that claim.
- The Modification does not include details of visual impacts of the proposed turbine to abutting properties, nor does it include visualizations of the design. It attempts to generalize about visual effects based on data from turbines 38% smaller than the Enercon turbine.
- The Modification offers no evidence for claims about Noise Compliance or potential noise impacts to the surrounding community. Such documentation is necessary for a substantially larger turbine.
- The Modification indicates "significant reduction to vernal pool impacts" with no evidence. There are a number of vernal pools on our property, and any impacts to these need to be assessed.

- In spite of repeated claims that the Modification “will maximize renewable energy production and minimize wetland and environmental impacts,” the Modification offers no evidence to support these claims.
- The abutting Nature Conservancy Property includes Beckley Bog, a site designated as a National Natural Landmark in 1977. The Nature Conservancy warns that “its bog is a fragile habitat with ‘extremely poor footing.’” Water flows to the bog from surrounding watershed, including Flagg Hill. BNE needs to demonstrate that the health of this rare bog will not be negatively impacted. The broader environment has the potential presence of protected, threatened, or endangered species including the threatened yellow spotted salamander and a beaver colony.
- BNE’s proposal does not include any details of infiltration impacts, nor potential impacts to neighboring wells. An assessment of groundwater effects should be completed.

Because the Modification constitutes a new project, it is incumbent on BNE to demonstrate that the project complies with all current laws, regulations, policies and guidance applicable to such projects, and we request that the Council hold BNE accountable to the regulatory and public processes such projects require. At this point, what BNE has proposed includes little apparent consideration of the technological details, nor the environmental, community, or public health impacts. Approval of a different turbine project in 2011 cannot in 2020 serve as the basis for BNE to build whatever or wherever suits the needs of the company without a full and complete review in accordance with all current requirements. Moreover, the substance of these laws, regulations, policies, and guidance should be applied to the Modification even if it is not considered a new project; they are the appropriate standards and procedures to apply under any circumstances.

We appreciate your consideration of these comments and concerns and will look forward to participating in the public discourse regarding the Modification as it evolves. Thank you.

Sincerely,

Handwritten signatures of Jonathan and Julia Gold in black ink.

Jonathan and Julia Gold

CC: State Representative Maria Horn, State Representative Jay Case, State Senator Kevin Witkos, First Selectman Matt Riiska, The Nature Conservancy, The Norfolk Foundation, Tom Fahsbender (Norfolk Planning and Zoning Commission), Mike Hallroan (Zoning Enforcement Officer, Starling Childs, Jim Jaspers, Adair Mali, Antonio Guindon, Willard Wood, Joyce Hemingson, Andrew Berger, Shelly Harms, Libby Borden, Sue Frisch

Attachments: 319 Beckley Road map; pertinent news articles

Attachment 3 – GSG January 10, 2011 comments on Petition 983

Page 1 of 1

Weston, Jessica

From: Mali/Guindon [toucan22@gmail.com]
Sent: Monday, January 10, 2011 11:20 AM
To: windinfo@norfolkcs.org; info@fairwindct.com; CSC-DL Siting Council
Subject: Re Wind turbine permitting moratorium

To: members of the Norfolk Planning and Zoning Commission
members of the Colebrook Planning and Zoning Commission
members of the Connecticut Siting Council-

As an owner of land in Norfolk and Winchester that is very close to the proposed site for "Wind Colebrook South" this issue has earned my close scrutiny.

I am strongly in favor of a one year moratorium on accepting wind turbine applications in order to allow both the state and local commissions the time to craft, debate and establish appropriate regulations governing the installation of large commercial wind turbines in residential areas. I think it is critical that we determine what is acceptable **BEFORE** we start permitting projects. Alternative energy IS important, but we must seize the opportunity we now have to get it **RIGHT**, and not allow these early applications to set the agenda or establish a precedent we might later regret.

Thank you for considering my input.

Sincerely,

Adair Mali
458 Winchester Road
Norfolk CT 06058

Attachment 4 – GSG February 3, 2020 comments on D&M Plan Modification

Adair Price Mali
458 Winchester Rd.
Norfolk CT 06058

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

February 3, 2020

Re: Petition #983

Dear Ms. Bachman and Members of the Siting Council,

I write representing myself and the other members of the Grant Swamp Group. We own property in Winchester, up against the town lines of Norfolk and Colebrook that clearly abuts BNE's proposed location for the new turbine. We wish to express significant concerns regarding Petition 983, BNE Energy's ("BNE") [1/9/2020] request for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is required for the Development and Management Plan Modification ("Modification").

This newly designed, newly enlarged, reconfigured and relocated wind turbine described in the Modification is proposed to be located adjacent to our 272-acre property, street address 246 Danbury Quarter Road in Winchester, CT. While the street address for the property is on Danbury Quarter Road, the property itself extends to the north and directly abuts BNE's proposed location for the new turbine described in the Modification. Despite the location of the project in proximity to our property, no one from BNE has contacted us regarding the Modification.

As abutters, we would like to request notice from BNE of its evolving Development and Management Plan. At the same time, we would like to draw the Council's attention to the absurdity of considering as a Modification a plan that creates a new set of abutters.

We would also like to request party status. As BNE expands its footprint beyond the boundaries set out in the 2011 approval, scales up beyond the parameters envisioned in the initial plan or its 2013 modification, and affects communities beyond the ones originally impacted, we would like the opportunity to inform the Council of the effects we anticipate that BNE's actions will have on our quality of life, our health and safety, and our environment.

In addition, we would like to state for the record that we do not think this project should be considered a modification of the old project. The regulations enacted in 2014 governing the placement and operation of wind turbines should be applied to this 2020 project. It was unfortunate that there were no regulations governing BNE's past project, but there is no reason to perpetuate that situation!

While we applaud BNE's efforts to expand Connecticut's renewable energy portfolio, we note that the urgency to do so has lessened since 2011 and 2013. This is due in part to the Siting Council's success at encouraging small renewable energy projects around the state, and also because of the green light given to two large offshore wind projects within the last years, each of them orders of magnitude greater in capacity than the turbine BNE proposes to perch above our land.

We appreciate your consideration of our concerns, and look forward to being able to participate in the public process should this project move forward.

Sincerely,

A handwritten signature in green ink, appearing to read "Adair Mali".

Adair Mali, for the members of the Grant Swamp Group

Attachment 5 – Klemens' April 20, 2011 Herpetological Assessment and Vernal Pool Assessment

Herpetological Assessment of Colebrook Wind Energy (BNE) Proposed Wind Turbine Sites, a.k.a.
Colebrook South, Flagg Road, Colebrook, CT

Prepared for Vanasse, Hangen, and Brustlin in RE: CT Siting Council Petition 983

April 20, 2011

Michael W. Klemens, LLC
POB 432 Falls Village, CT 06031

Introduction:

At the request of Vanasse, Hangen, and Brustlin I conducted an evaluation of the subject parcel on April 4th, 5th, and 17th, 2011. The goals of my study were to determine the suitability of the wetlands on and immediately off site to support vernal pool obligate amphibians. Vernal pool obligate amphibians contribute significantly to the food chain and nutrient cycling of the forest ecosystem and require extensive areas of forested habitat surrounding their breeding sites (Calhoun and Klemens, 2002). In addition, one State-listed Special Concern vernal pool obligate amphibian, the Jefferson salamander (*Ambystoma jeffersonianum*), has been reported from North Colebrook (Klemens, 1993: 27, Bogart and Klemens, 1997). I also assessed the suitability of the watercourse habitats on site to support the State-listed Threatened spring salamander (*Gyrinophilus porphyriticus*). Within Connecticut, the spring salamander is restricted to the upland areas of the northwest and northeast uplands including Colebrook (Klemens, 1993:65). I also assessed the suitability of the site for any of Connecticut's listed amphibians and reptiles, including the smooth green snake (*Liophorophis vernalis*) which has been reported from this general area of Colebrook (Klemens, 1993:245).

Methods:

Vernal pool amphibians were detected both by cover searching, as well as examination of wetland areas for egg masses and spermatophores (sperm packets deposited by male Ambystomid salamanders). Frogs were also detected by audible calls. Live-trapping along wetland edges augmented information collected by visual examination. Habitat suitability for spring salamanders was assessed by examination of seepages and watercourses to document perennial, cold, detritus rich systems seepage systems. Other species were assessed using the habitat descriptions contained in Klemens (1993) augmented by the investigator's knowledge of habitat types used by these species in the northwestern uplands of Connecticut.

Results (Vernal Pools):

Wetland One encompassed four areas that could be defined as "cryptic vernal pools", that is a vernal pool embedded within a larger wetland complex (see attached figure).

CVP 1-A is the most robust system occurring in the northeastern lobe of Wetland One, where it adjoins a mixed deciduous wooded ridge. This area was defined by large numbers of male spotted salamanders (*Ambystoma maculatum*)(n=75) that were trapped on April 4-5th, as well as several communal egg masses of wood frogs (*Rana sylvatica*) (more than 25 in total) that were deposited sometime between April 5-17th. Red-spotted newts (*Notophthalmus viridescens*) (n = 283) and two green frog (*Rana*

clamitans) tadpoles were also trapped and spring peepers (*Pseudacris crucifer*) were heard calling. Hundreds of spotted salamander spermatophores were observed on April 17th.

Two areas of secondary use occur in the northwestern lobe of Wetland One.

CVP 1-B occurs near the confluence of a perennial watercourse embedded within that wetland on BNE property. Although no spotted salamanders were found here on April 4-5th, several spotted salamander spermatophore fields, one spotted salamander egg mass, some wood frog egg masses, and two spotted salamanders were found here on April 17th. Red-spotted newts (n=42) were trapped here on April 4-5th, and spring peeper eggs were noted on April 17th.

CVP 1-C lies just off site, embedded in that same lobe of Wetland One, on The Nature Conservancy property. A single male spotted salamander was found under a log at the edge of this shrub and sphagnum dominated pool, and a small number of spotted salamander spermatophores were noted in the deeper portions of the pool.

One additional area of incidental use was located in the southeastern corner of Wetland One.

CVP 1-D is defined by 20+ spotted salamander spermatophores at the edge of the wetland not far from the beaver dam. Searching of adjacent areas north and south of this area did not reveal any spotted salamander activity.

Discussion Vernal Pools:

Using the assessment criteria developed by Calhoun and Klemens (2002:9) CVP 1-A and CVP 1-B are Tier One cryptic vernal pools, indicated as such by the presence of two or more vernal pool obligate species confirmed breeding in those areas, 25 or more egg masses, and an intact vernal pool envelope (0-100 feet) and an intact critical upland habitat area (100-750 feet). Tier One pools are the most valuable vernal pools and are worthy of conservation planning. CVP 1-C and CVP 1-D are Tier Three cryptic vernal pools, indicated as such because of the low species diversity and low number of individuals and lack of egg masses. Despite an intact envelope and critical upland habitat, these areas are marginal for vernal pool breeding species and are the lowest priority for conservation planning compared with Tier One and Tier Two pools. I recommend that Calhoun and Klemens' (2002) best development practices be adhered too around CVP 1-A and CVP 1-B. This means that no more than 25% of the critical upland habitat zone (100-750 feet) can be cleared, the vernal pool envelope is not disturbed, and that the best management and development practices cited on pages 18-26 of Calhoun and Klemens (2002) be followed were applicable.

I also examined Wetlands 2, 3, and 4 to determine their suitability to support vernal pool obligate species, as the potential for these wetlands to serve as vernal pools had been raised in the interrogatories. Wetland 2 was frozen on April 4-5th, and was completely thawed on April 17th. No evidence of vernal pool species were documented in this wetland. The wetland is small, and the lack of staining on the leaves indicate that the inundation is temporary and the leaves do not decompose in the manner that is typical of sustained inundation. Wetland 4 is a stony, boulder-strewn, slightly sloping wetland in a logged over clearing. As there has been close to two inches of rain the previous night, there was considerable flow through rivulets downhill, the only standing water was a small (2-3 feet in diameter) pocket in the base of tree throw which did not exhibit any characteristics of a vernal pool. Wetland 3 lies on flatter ground in a forested area. Although there was considerable standing water due

to the previous nights' rain, the distribution of the water was in shallow pockets, no more than a foot in depth, and the leaves exhibited none of the staining characteristic of prolonged inundation sufficient to support vernal pool function. Therefore it is my professional opinion that neither Wetlands 2, 3 or 4 have sufficient depth and hydro-period to support vernal pool obligate species.

Results/Discussion (Spring Salamander):

Two areas of watercourse were examined to assess their suitability for spring salamander use. These were the perennial, seepage fed watercourse in the hemlock forest between CVP 1-B and CVP 1-C as well as Wetland 5. The former has characteristics suitable to support spring salamanders, including detritus, slow meandering flows that dissipate velocity, subterranean flows, dense shading by hemlock forest, and flat stones on the bottom of the main channel. Dusky salamanders (*Desmognathus fuscus*) were found in this reach. This species is an indicator of streams able to support spring salamanders, as well as serving as a major food source for the spring salamander. A wide, intact forested buffer should be left around this stream corridor to prevent thermal alterations. All construction activities near to or draining into this stream should pay special attention to the adverse affects of siltation to this delicate system and to the spring salamander, there should not be any crossings of this stream corridor between CVP 1-B and CVP1-C.

Wetland 5 has marginal flows, although it was flowing on April 17th due to the heavy rain, I would classify it as too small and intermittent in nature to support the spring salamander. Moreover, there has been considerable disturbance in the area because of the construction of residences and driveways, which have degraded the wetland beyond what, in my professional experience, is tolerable for this species.

Additional Species of Herpetofauna and other Incidental Wildlife Observations:

I have assessed the site to determine if any other State-listed species of amphibian or reptile could potentially occur on the site. The high elevation of the area precludes many species, however, there is habitat on and near the site for two State-listed Special concern snakes. The smooth green snake has been recorded by the NDDB in the general vicinity of the project site. Smooth snakes were once widely distributed in Connecticut, even occurring in vacant lots in New Britain and Hartford, and suffered a population crash in the 1950s because of the use of pesticides coupled with a loss of grassland habitats (Klemens, 1993: 244-248). The lack of open habitats in many areas, including northwestern Connecticut, has impeded recovery of this species. The approximately three acres that has been cleared around the meteorological tower would make an excellent habitat for this species, especially if it is extended and connected to the clearing for the proposed Wind Turbine No. 2. The meteorological tower is situated on a dome shaped rocky hill, similar to many green snake habitats that occur in the northwest corner of the State. I would recommend that the cleared area not be allowed to be reforested and be mowed annually in October-November to maintain its habitat value. With time I would anticipate this area to be colonized by a variety of small snakes that occur in the area. This open area would ecologically complement the open area that has been recently created on the adjacent gun club property.

The grassy edges of Wetland 1, as well as the damp forest edges could also support the eastern ribbon snake (*Thamnophis sauritus*), another State-listed Special Concern species. Similar to the smooth green snake, the clearing resulting from the proposed project will actually enhance habitat for both of these species as they require unforested open habitats. While the ribbon snake requires wetland edges and

wet meadows, the smooth green snake is equally at home in grassy wetlands as well as dry rocky balds as exemplified by the meteorological tower site.

Western EcoSystems Technology, Inc. in their *Breeding Bird Survey- Final Report* noted an incidental observation of a leopard frog (*Rana pipiens*) on the site. I suspect that they misidentified the common and widespread pickerel frog (*Rana palustris*). Leopard frogs are uncommon and localized in Connecticut, and are State-listed Special Concern species. They have no tolerance for the low pH levels anticipated (by the presence of sphagnum moss and hemlock) on site. The distribution of this species in Connecticut is limited to circum neutral water, with a pH of 6 or higher. Therefore, this species is restricted to the limestone valleys of western Connecticut, and the larger river basins of central Connecticut, where there is considerable buffering of the wetlands adjoining rivers such as the Farmington, Connecticut, Coginchaug, and Scantic rivers. A detailed discussion of leopard frog ecology and distribution in Connecticut can be found in Klemens, 1993: 134-140.

Two incidental bird observations were made during my survey. Pileated woodpeckers (*Dryocopus pileatus*) were actively foraging and calling on April 4-5th in the area immediately above Wetland 5. During the time we spent on site they were actively digging into a tree adjoining the logging road that leads up into the site behind the house that BNE has recently purchased. A small great blue heron (*Ardea herodias*) rookery is present on the south end of the beaver pond (Wetland 1). On April 17th I counted at least four nests in that area, and at least one (possibly two) were active with pairs of great blue herons presumably in the process of laying and/or incubating eggs.

Conclusions:

I have examined the various site plans submitted to the Siting Council by BNE and have concluded that there will be no adverse impacts to the amphibians and reptiles discussed in this report from the proposed activities of Wind Colebrook South provided that my recommendations for impact avoidance and project management are followed as outlined in this report. In the case of the smooth green snake, I would anticipate that the project, with the maintenance of the open areas as indicated in this report, will result in a net benefit to this species by the creation of a significant new area of prime habitat. I look forward to addressing any additional questions that the Siting Council and other parties may have concerning these issues.

Literature Cited:

- Bogart, J. P. and M. W. Klemens. 1997. **Hybrids and genetic interactions of mole salamanders (*Ambystoma jeffersonianum* and *A. laterale*) (Amphibia: Caudata) in New York and New England.** American Museum Novitates 3218, pp. 78., 8 figs., 16 tabs.
- Calhoun, A. J. K. and M. W. Klemens. 2002. **Best Development Practices (BDPs) for Conserving Pool-breeding Amphibians in Residential and Commercial Developments.** MCA Technical Paper No. 5, Metropolitan Conservation Alliance, Wildlife Conservation Society, Bronx, NY.
- Klemens, M. W. 1993. **The Amphibians and Reptiles of Connecticut and Adjacent Regions.** Conn. Geol. Nat. Hist. Surv. Bulletin 112:1-318 + 32 plates.

