

Date: October 5, 2010

To: Virginia Department of Environmental Quality

From: Rick Webb; 481 Ravens Run Road, Monterey, VA 24465; 540-468-2881; rwebb@vawind.org

Re: Follow-up Comments and Questions on Proposed Regulation; 9VAC15-40. Small Renewable Energy Projects (Wind) Permit by Rule (adding 9VAC15-40-10 through 9VAC15-40-140)

This submission includes follow-up comments, questions, and requests for information concerning the regulations proposed by Virginia Department of Environmental Quality (DEQ) to implement the Permit by Rule (PBR) legislation for wind energy projects. These follow-up comments, questions, and information requests focus on the DEQ's responses to specific questions posed in my original comments, dated August 18, 2010.

I have three major objections to the process followed by the DEQ in the development of the proposed regulations.

- 1) Decisions concerning a number of critical regulatory requirements are described by the DEQ as based on Regulatory Advisory Panel (RAP) consensus. This is evasive or nonresponsive to requests for the basis of important rule-making decisions. As specified below, I am asking that the DEQ identify the objective criteria that served as the basis for RAP consensus decisions. I am also asking that the DEQ provide the documents and other information that were considered by the RAP as the basis for its consensus decisions.
- 2) Contrary to the stated intent of the PBR legislation and the DEQ's stated intent in the notice of proposed regulation, the DEQ indicates that it intends to rely in a number of instances on guidance "to be developed" for implementation of the PBR rather than setting forth permit requirements "up front." This both defeats the intent of the legislation to provide certainty in the permitting process and denies the public a meaningful opportunity to comment on the rules that will ultimately be in effect.
- 3) The DEQ failed to respond to my specific comment and question concerning the basis for ruling that only T&E and SGCN wildlife species warrant site-specific data collection. The DEQ also fails to explain why, for onshore wind projects, mitigation plans to provide wildlife protection are only required when state T&E wildlife or bats are found within the defined disturbance zone. The PBR legislation does not limit wildlife protection to only these few species, nor does it define "significant adverse impacts to wildlife" to exclude consideration of impacts to wildlife other than state T&E species and bats. The DEQ's proposed regulations are thus not compliant with the PBR legislation.

Specific additional comments, questions, and requests for information related to my original comments (in green) and DEQ responses follow. The numbering of my original comments is the same as in my original comment submission.

1. How was it determined that a disturbance zone defined as the directly impacted area plus a margin of 100 feet provides a sufficient criterion for evaluation of potential wildlife impacts?

DEQ response to (1): Issue resolved by consensus of members of the RAP.

Follow-up question: What objective criteria provided the basis for the RAP determination?

Request for information: Please provide the documents and information considered by the RAP in making this determination.

4. Given that the legislation does not appear to impose any such limitation, how was it determined that only T&E and SGCN wildlife species warrant site-specific data collection?

DEQ response to (4): *The DEQ provided no response.*

Follow-up question: What objective criteria provided the basis for the DEQ or RAP determination to limit site-specific data collection to only these species?

Request for information: Please provide the documents and information considered by the DEQ or RAP in making this determination.

5. What protocols or standards does the DEQ intend to require, and if it is the intent of the legislation to create a PBR process that clearly establishes permit review requirements "upfront," is it not necessary to include explicit language in the regulations concerning protocols and standards required for all surveys, data collection, and analysis?

6. If the public is to be provided an actual opportunity to make informed and meaningful comments on the proposed PBR regulations, doesn't the public need an opportunity to examine and comment on the protocols and standards for required surveys, data collection, and analysis?

15. Will the DEQ review and approve monitoring plans, and what criteria, including search methods, search frequency, search area, and searcher qualifications, will the DEQ consider in approving monitoring plans?

DEQ response to (5), (6), and (15): Protocols and methods details were developed by consensus of the RAP. The DEQ plans to include these as a guidance to be written after the regulations are final, per consensus of the RAP. Guidance drafting is not subject to Administrative Process Act.

Follow-up question and comments: What objective criteria provided the basis for the RAP determination that protocols and methods should not be included as regulations subject to formal public review and comment? Informal development of requirements as guidance at an unspecified later time does not conform with the purpose of the PBR or the stated intent of the DEQ to provide certainty and rules "up front." Protocol and method requirements should be proposed as regulations and the public should be provided a new formal comment period to review and provide input on these requirements.

Request for information: Please provide the documents and information considered by the RAP or DEQ in developing protocols and methods details. Please provide copies of the guidance provisions suggested by the RAP and any other guidance provisions under consideration by the DEQ.

7. Does the DEQ plan to require access to all wildlife data and analysis results?

16. Will the DEQ require submission of all monitoring data, and will this data be made available to the public?

DEQ response to (7) and (16): The DEQ intends to clarify requirements related to data submission, evaluation, retention, and public availability in regulation or guidance.

Follow-up comment: The DEQ should make requirements known "up front," and requirements should be proposed as regulations rather than guidance. The public should be provided a new formal comment period to review and provide input on these requirements.

Request for information: Please provide any documents and information under consideration by the DEQ that concern data submission, evaluation, retention, and public availability requirements.

9. Is there a threshold of potential environmental harm that will result in permit denial or substantial project modification?

10. Can wind energy projects be permitted in cases where significant adverse impacts to state-listed T&E wildlife cannot be avoided?

DEQ response to (9) and (10): *The DEQ provided no specific response to (9).* The DEQ indicates that approval decisions such as approval of mitigation plans will be based on the final version the PBR regulations after consulting with "sister" agencies.

Follow-up comments and question: The DEQ should respond to the simple question posed in question (9): Is there any threshold of potential environmental harm that will result in permit denial or substantial project modification? Consistent with the intent of the PBR legislation, the DEQ should make requirements known "up front," and requirements should be proposed as regulations rather than guidance. The public should be provided a new formal comment period to review and provide input on these requirements.

11. What does this mean ["development of reasonable and proportionate mitigation plans that offset adverse impacts"]; does it mean that an applicant might satisfy mitigation requirements by providing protection for historic resources other than the particular historic resource that is adversely affected by the project?

DEQ response (11): Questions on this were resolved by consensus of the RAP with DHR input. DEQ will draft guidance.

Follow-up comment: The DEQ should make requirements known "up front," and requirements should be proposed as regulations rather than guidance. The public should be provided a new formal comment period to review and provide input on these requirements.

Request for information: Please provide copies of the RAP's recommended guidance provisions.

12. What criteria or rationale support the decision to limit money spent on, or cost of, avoidance of bat mortality to \$5,000 per turbine?

DEQ response to (12): The issue was resolved by consensus of members of the RAP.

Follow-up question: What objective criteria provided the basis for the RAP consensus determination?

Request for information: Please provide the documents and information considered by the RAP in making this determination.

14. Why hasn't the DEQ required curtailment or turbine shutdown to protect raptors and migratory birds?

DEQ response to (14): Wildlife mitigation issues were resolved by consensus of the RAP.

Follow-up question: What objective criteria provided the basis for the RAP consensus determination?

Request for information: Please provide the documents and information considered by the RAP in making this determination.

Please consider the above requests for documents and information as Freedom of Information Act requests. I also requests that a new formal public comment period be provided once the DEQ has provided the requested information and completed development of a complete set of proposed regulations to implement the PBR.