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February 6, 2009

Jacalyn Fletcher, Court Manager
Vermont Environmental Court
2418 Airport Road, Suite 1
Barre, VT 05641

In re: Sheffield Wind Project
Docket No. 252-10-08

Dear Jackie:

I am sending electronically today the following documents in the above-captioned matter:

1. Appellants' Motion to Stay or Remand the Appeal and Motion for Extension of time to Respond to the Permittee's Cross-Motion for Summary Judgment.
2. Copy of email from Judith Dillon.
3. Memorandum of Permittee's consultant Multiple Resource Management Inc.

I called the Court for permission to send these electronically but learned that the Court is closed today. It would be helpful for the Court to have been able to review this motion prior to the conference call scheduled for Monday, February 9, 2009 at 8:30 a.m. Although it appears that this will not be possible due to the timing, we intend to at least raise the issues in the motion at the conference.

I am also sending this material electronically to Attorneys Ron Shems and Judith Dillon. Mr. Brouha will send hard copies to the Court.

Very truly yours,

Stephanie J. Kaplan
Stephanie J. Kaplan, Esq.

cc: Ronald Shems, Esq.
Judith Dillon, Esq.

STATE OF VERMONT
VERMONT ENVIRONMENTAL COURT

Re: Sheffield Wind Project

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Docket No. 252-10-08 Vtec

**APPELLANTS' MOTION TO STAY OR REMAND THE APPEAL
AND MOTION FOR EXTENSION OF TIME TO RESPOND TO
THE PERMITTEE'S CROSS-MOTION FOR SUMMARY JUDGMENT**

In a letter to this Court dated February 3, 2009, ANR's attorney Judith Dillon stated that ANR is requiring the Permittee Signal Wind Energy to seek an amendment to the Discharge Permit #5535-INDC (NPDES #VTS000080) that is the subject of this appeal. The Permittee is required to obtain an amendment to its Discharge Permit because of changes that it has made to its plans since filing its application for the Permit. According to the Permittee. The changes are based upon the Permittee's submission to the Public Service Board of Final Design Plans that substantially alter the design of the project that was reviewed by ANR and approved in the Discharge Permit. These changes are described in Attachment E, Affidavit of Krista Reinhart and letter from Krista Reinhart to Kevin Burke of ANR dated January 14, 2009.¹ Attachment E was sent electronically to the Court in an email from the Permittee's attorney Ron Shems on January 21, 2009; the email included Attachments B through F to the Permittee's Motion for Summary Judgment. Some of the changes are shown on Attachment F, a map entitled "Sheffield Wind Project/Sheffield, Vermont/Site Layout; DEC Approved Construction

¹ The last four pages of this five-page letter indicate the date as January 14, 2008 instead of 2009, an apparent mistake.

Stormwater Permit (No. 5535-INDC) vs. December 2008 Layout” dated January 13, 2009.

Proceeding with this appeal would result in a substantial waste of time and resources for the parties and for the Court

According to ANR attorney Judith Dillon, ANR intends to follow the following procedure with respect to the amendment application: “ANR will review the amendment application once it is received. Once it is deemed administratively and technically complete, a draft permit will be placed on the required 30-day public notice, and at the same time a public hearing will be scheduled approximately 30 days after the notice period, which will be specified on the public notice, in the Town of Sheffield. Everyone currently on the list of interested persons will receive a copy of the public notice when it goes out.” See attached copy of email from Judith Dillon.

The appeal pending before the Court is from a Discharge Permit that is being amended. It makes no sense to go forward with the appeal at this time. Doing so would be a waste of the resources of the parties as well as of the Court. The amendment may address or affect the issues in the appeal; it is impossible to know the extent of the changes until the process has run its course and an amended Discharge Permit is issued. ANR could impose conditions that include further design changes, or it could change its position with respect to implementing the law, such as requiring an Anti-Degradation analysis as the Appellants believe it should. The amended Discharge Permit could result in different issues, or the issues in the existing appeal could be superseded or rendered moot. It would be a waste of time and resources for the parties to be preparing and

submitting arguments concerning a permit that could be superseded or moot once an amendment is issued.

Another reason that proceeding with an appeal of the Discharge Permit while an amendment application to the same Permit is pending is wasteful of resources is because once the amended Discharge Permit is issued, it is likely to be appealed to this Court. If the existing Discharge Permit appeal is underway, then there will be two appeals involving the same project on two different tracks. In addition, the Permittee will have to obtain approval from the U.S. Corps of Engineers. As it did before, that agency may wish to consult with the U.S. Environmental Protection Agency and Fish & Wildlife Service and may require further changes to accommodate any of their concerns, in which case the parties will have wasted time and resources responding to the Discharge Permit now under appeal.

The Environmental Court is directed to consolidate and coordinate proceedings to “promote expeditious and fair proceedings and avoid unnecessary costs or delay.”

V.R.E.C.P. 2(b) states in full:

(b) Coordination of Proceedings. On motion of a party, or on the court's own motion, where the same violation or project involves multiple proceedings that have resulted or may result in separate hearings or appeals in the Environmental Court, or where different violations or projects involve significant common issues of law or fact, the court may advance, defer, coordinate, or combine proceedings and may make other orders that will promote expeditious and fair proceedings and avoid unnecessary costs or delay.

Based on this rule, as well as the policy underlying the rule to avoid unnecessary waste of resources by consolidating proceedings that involve the same project, the Court should stay or remand the appeal of the Discharge Permit until the amendment process is

complete and an amended Discharge Permit issued, at which time any appeal of the amended Discharge Permit may supersede the existing appeal or may be consolidated with the existing appeal consistent with both the express language and the intent of V.R.E.C.P. 2(b).

Furthermore, a remand or stay of the appeal is necessary in order for ANR to have jurisdiction over the amendment application. It is axiomatic that an appeal divests an administrative agency of jurisdiction over the matter, and that an administrative agency therefore cannot act on an application to amend the permit under appeal absent a remand or stay of the appeal. *See In re Petition of Twenty-Four Utilities*, 159 Vt. 363, 366 (1992) (The Public Service Board needed an appeal remanded from the Supreme Court in order to have jurisdiction over an amendment application to a purchase contract that was the subject of the appeal in the Supreme Court.).

The Permittee's changes to the design of the project will affect the stormwater runoff regime that was reviewed and approved by ANR

While the Permittee attempts to downplay the significance of the changes it is making to the design of the project, the design changes are obviously significant enough that ANR believes an amendment to the permit is required. The changes proposed by the Permittee can be summarized as follows:

- 1) Twelve of 16 wind turbines will be of a new design; 2) eight of the turbines and their access roads have been relocated from their original sites to sites ranging from 61 to 324 feet from their original locations; 3) all the major auxiliary structures associated with the turbine array including the substation, the O&M building and the laydown yard will be relocated to a single site where they will present one large

industrial complex and change the stormwater runoff regime; 4) the overhead power transmission line has been rerouted to the new substation; and 5) the entrance to the project area will be entirely reconfigured with new potential environment impacts, especially to the fragile headwater streams.

The Permittee has not described the changes in much specificity, and thus it is impossible to fully understand the magnitude of the new or different impacts that will occur. But to the extent that the proposed changes are described, they have the potential to affect the stormwater discharge regime that was approved in the Discharge Permit at least in the following respects:

1. The O&M building and the laydown yard are proposed to be moved from their original location. As shown in the plans that were approved in the Discharge Permit, the laydown yard was to be located near the turbine pads, and the substation and O&M building were to be located in the valley bottom adjacent to Calendar Brook. In the revised plan, the laydown yard, the substation, and the O&M building would all be moved to an exposed side hill location above Duck Pond Road and Interstate 91.² See Attachment F to the Permittee's Motion for Summary Judgment. This creates the potential for stormwater runoff pollution of Nation Brook and Millers Run, and new avenues for stormwater runoff into the fragile headwaters of the five streams receiving runoff from the project, none of which was considered when ANR reviewed the Discharge Permit application and issued the Discharge Permit.

2. The entrance to the project has been substantially reconfigured so that instead of being solely an entry from the north, the enlarged entrance intersection will

² The original plan showed a well and sanitary facilities in the O&M building.

now accommodate overweight and outsized vehicles from both north and south, it is now proposed to be a large cleared area bounded by New Duck Pond Road to the west and by two road prisms (one curving from the north and one curving from the south) over 16 feet wide to accommodate vehicles with a turning radius in excess of 150 feet. This new entrance configuration was not considered when the application for the Discharge Permit was reviewed or the Discharge Permit issued. The new access road configuration creates new and unexamined environmental impacts, including cumulative impacts from erosion and sedimentation to Nation Brook and Millers Run from creation of this large intersection and complex. Coupled with the stormwater runoff from construction of the substation, maintenance building, laydown yard, and from other construction higher in the watershed, the stormwater runoff from this intersection has the potential to be delivered with erosive force to the headwaters of Nation Brook less than 150 feet to the west. See Exhibits 2 and 3 attached to the Appellants' Motion for Summary Judgment (Plan Sheets 5C-400 and 401 of the Permittee's Final Design Plan submitted to the PSB on December 23, 2008).

3. The revised plan involves relocating eight turbines from 61 feet to 324 feet from their original locations and to higher ground. While the Permittee claims that the reason for these changes is "to reduce cut and fill and overall impacts," it fails to mention "the expanded cut and fill around T3 and T8" that it has proposed. See page 2 of the Memorandum from the Permittee's consultant Multiple Resource Management, Inc. that was submitted to the PSB with the Permittee's Final Design Plans on December 23, 2008 (attached hereto). The increased cuts and fills in these areas were not considered when the Discharge Permit application was reviewed or the Discharge Permit issued.

4. Many substantial cuts and fills will be required and many new pathways for runoff and pollution of the watershed are being created. Of particular concern is the proximity of the consolidated substation, O&M building and laydown area to Nation Brook and Millers Run. No analysis of the new discharge locations and the potential impacts to these fragile headwaters has been provided, and therefore the magnitude of the potential water pollution cannot be ascertained.

These changes will also result in a different area of disturbance. However, the size of the area of disturbance has not been recomputed and the differences in peak discharges as compared to the undisturbed state have not been analyzed, although they potentially will result in changes to the watershed hydrology in the five receiving streams and would certainly be different from the stormwater discharge regime that was approved by ANR.

The Court should grant an extension for responding to the Cross Motions for Summary Judgment filed by the Permittee and the Appellants

As described herein, proceeding with this appeal while an amendment application is pending would be a substantial waste of resources for everyone involved.

Accordingly, the deadline for responses to the Cross-Motions for Summary Judgment filed by the Permittee and the Appellants should be extended so that, should the Court deny this motion, the responses would be due two weeks after the Court's decision on this motion, and, of course, suspended entirely if the Court grants this motion.

Conclusion

For the reasons stated herein, the Appellants respectfully request that this Court 1) remand or stay the appeal of the Discharge Permit pending ANR's issuance of an

amended Discharge Permit, and 2) extend the deadline for filing responses to the Cross-Motions for Summary Judgment until at least two weeks after a decision on this motion is issued should the Court deny the motion, or indefinitely should the Court grant the motion.

DATED this 6th day of February, 2009.

APPELLANTS

Stephanie J. Kaplan

By

Stephanie J. Kaplan, Esq.

X-Modus-ReverseDNS: OK
X-Modus-BlackList: 159.105.87.228=OK;Judith.Dillon@state.vt.us=OK
X-Modus-RBL: 159.105.87.228=OK
X-Modus-Trusted: 159.105.87.228=NO
X-Modus-Audit: FALSE;0;0;0
X-AuditID: 9f6957e3-aac33bb000001c1a-25-4982225667e5
From: "Dillon, Judith" <Judith.Dillon@state.vt.us>
To: 'Stephanie Kaplan' <skaplan@jackhill.org>, "rshems@sdkslaw.com"
<rshems@sdkslaw.com>
Date: Thu, 29 Jan 2009 16:40:37 -0500
Subject: RE: Sheffield wind
Thread-Topic: Sheffield wind
Thread-Index: AcmCGpVix5skeolEQ1anYfebD5gW3wAEtOtg
Accept-Language: en-US
acceptlanguage: en-US
X-Brightmail-Tracker: AAAAAA==

Stefanie and Ron,

ANR will review the amendment application once it is received. Once it is deemed administratively and technically complete, a draft permit will be placed on the required 30-day public notice, and at the same time a public hearing will be scheduled approximately 30 days after the notice period, which will be specified on the public notice, in the Town of Sheffield. Everyone currently on the list of interested persons will receive a copy of the public notice when it goes out.

Please let me know if you have any questions on this matter,

Judith



MULTIPLE RESOURCE MANAGEMENT, INC.

113 stonebroke rd. leicester, vermont 05733 phone & fax (802) 247-3468

**SUPPLEMENTAL REVIEW:
REVIEW OF POTENTIAL IMPACTS OF ACCESS ROAD & TURBINE REALIGNMENTS
ON NECESSARY WILDLIFE HABITATS
Vermont Wind, LLC -- Sheffield Wind Project, December, 2008**

Final design plans for the Sheffield Wind Project dated December 2008 reflect several site plan modifications. The first is changes to the primary access from Duck Pond Road and includes relocation of project infrastructure. The second is a re-routing of the access road that will serve Wind Turbine 6 (T6). The third change involves eight turbines that have been realigned to take advantage of wind patterns and/or reduce cut-and-fill. These modifications were examined for necessary wildlife habitats (specifically deer winter shelter and black bear habitat) and moose concentration areas. As discussed below, the design changes do not have the potential to cause undue adverse impacts on necessary wildlife habitats.

Realigned Entrance and Relocated Project Infrastructure

A new alignment has been proposed from Duck Pond Road to the previously designed access road to the project. Included in this reach are the relocated sub-station an operations and maintenance building, and laydown yard, all sited near the road crossing with the VELCO transmission line. This new alignment crosses land not previously examined for the wildlife habitats of concern, consequently, a field reconnaissance was conducted on August 18, 2008 to examine the site.

The re-aligned approach road and substation/O&M building/laydown yard area are predominantly located within a forest management stand that has undergone extensive timber harvesting. As a result of the harvesting, the site is now a dense mix of hardwood and balsam fir regeneration in the seedling and sapling stage of development. Though this stage of growth offers food and cover for a wide variety of wildlife species, including browse for both white-tailed deer and moose, it does not offer what is considered necessary wildlife habitat or provide for moose winter concentrations. Relocation of the access approach and project infrastructure to this location will have no undue adverse affect on necessary wildlife habitats.

T3 to T6 Interconnection Road

The area encompassing the proposed new clearing limits of this interconnection had previously been field checked for necessary wildlife habitats and moose winter concentration areas (MWCA) during the original section 248 review process. The clearing limits proposed for this realignment were overlaid on the necessary wildlife habitat map to identify any potential impacts. The clearing limits would have impacted a cluster of bear scarred beech (BSB) just southeast of T3 with a potential direct removal of 19 BSB. As a result, an alternative routing was proposed in late August and subsequently incorporated into the new design that is now reflected in the final design plans (Signal Wind/Sewall, rev. 4, 12/10/08). This new routing forks the road immediately beyond T1 with the left fork accessing T1 as proposed and the right fork traversing across the MWCA, below the cluster of BSB, and rejoining the proposed interconnection to T6. Though it involves approximately 630 feet of new road through the northern end of the MWCA, nearly 1,000 feet of road through the same habitat is eliminated by deleting the original access road from T12 to T6 and better alignment to T11 and T5. This alternative alignment lessens the intrusion into the MWCA, and avoids the large cluster of BSB immediately south of T3. Thus this proposed change does not have the potential to cause an undue adverse impact on necessary wildlife habitats.



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Micro-Siting of Turbines

The shifting of 8 turbines and associated road changes were reviewed. All new clearing limits had previously been field-checked for necessary wildlife habitats and moose winter concentration areas (MWCA) during the original section 248 review process. There is a net increase in BSB loss but only by 3 trees. This is more attributable to expanded cut-and-fill around T 3 and T8 than the realignments. As a result of the realignments, however, T6 and T12 are completely removed from BSB Polygon 3-4 which will lessen potential indirect impact on the BSB stand. The realignments in general diminish project pressure on both the moose and bear habitats and thus do not have the potential to cause undue adverse impacts.