

Saving Special Places
April 9, 2016

Site Evaluation Committee (“SEC”): What You Need to Know

By: Amy Manzelli, Esq. & Jason Reimers, Esq., BCM Environmental and Land Law

Is a wind farm, electric power line, pipeline, or other energy facility being planned across or near your protected land? Impacted organizations have a voice in the siting of energy facilities! If you want your voice to be heard, here is what you need to know about the Site Evaluation Committee and the permitting process for energy facilities in the State of New Hampshire.

What is the Site Evaluation Committee (“SEC”)?

The purpose of the Site Evaluation Committee (“SEC”) is to approve or disapprove of sites for energy facilities that impact New Hampshire’s population, private property, the location and growth of industry, the overall economic growth of the state, the environment, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. The SEC’s function is to find an equitable balance between the likely adverse impacts and the likely energy benefits that decisions about siting, construction, and operation of energy facilities have on the State of New Hampshire.

The SEC is designed to efficiently make decisions on siting to prevent undue delays in the construction of new energy facilities by acting as a one-stop shop for all state permits. At the same time, the SEC ensures that entities planning to construct facilities provide full and complete disclosure of their plans to the public. The SEC treats the siting, construction, and operation of energy facilities as significant aspects of land-use planning where environmental, economic, and technical issues are resolved in a consistent fashion.

The SEC is a nine-member committee, comprised of seven state officials, including three members of the Public Utilities Commission (“PUC”), one member of the Department of Resources and Economic Development (“DRED”), one member of the Department of Environmental Services (“DES”), one member of the Department of Transportation (“DOT”), one member of the Department of Historical Resources (“DHR”), and two members of the public, one of whom is a member of the New Hampshire Bar Association.

The Chair of the PUC also serves as the Chair of the SEC. The current Chair is Martin Honigberg. State agency members may delegate their role on the SEC to a senior administrative employee or staff attorney. Whenever possible, an attorney is selected to be the presiding officer over any hearings.



Subcommittees are an integral part of the SEC process. The SEC ordinarily appoints a subcommittee to consider any particular energy facility application. At least seven members, two of whom must be members of the public, are required to issue a certificate or to address a petition for jurisdiction. Five members form a quorum to conduct business. For all other matters, subcommittees of three are allowed, with at least one public member. For a subcommittee of three, two members form a quorum. However, a party may always object to the use of a subcommittee. A full nine-member committee is required for certain actions, including rulemaking, approving budgetary requirements, proposing funding plans, and approving support staff.

What is the Jurisdiction of the SEC?

The SEC has jurisdiction over electric generating facilities of 30 megawatts (“MW”) or greater, electric transmission lines over 100 kilovolts (“KV”) or greater over routes not already occupied in association with a generating facility, electric transmission lines of 100KV or greater over ten miles in length over routes not occupied, new electric transmission lines over 200KV, natural gas pipelines, gas plants, storage facilities that store enough energy on site to provide seven days of continuous operation at a rate equivalent to the energy requirements of a 30MW plant, and refineries.

The SEC may, at its own discretion or by petition, take jurisdiction over smaller facilities that are at least 5MWs in size. This includes renewable facilities such as wind, geothermal, biomass, methane, and more.

The SEC can exempt a facility from review if there is adequate protection under the law; consideration is only needed from a smaller group of agencies; public response indicates individual permitting will suffice; and all environmental effects are otherwise regulated by federal, state or local requirements.

Who Can Intervene in a Matter in Front of the SEC?

The good news for would-be intervenors is that the SEC has historically been rather permissive with respect to granting intervention. The following are potential types of intervenors, listed in order of the most likely to be granted intervention to the least. However, even the least likely is still relatively likely to be granted intervention.

Mandatory Intervention

Mandatory intervention is when an entity has a statutory right to intervene, i.e., the SEC has almost no discretion to deny intervention. The following types of intervenors are likely to be granted intervention by right:

- Property owners (fee simple) on (including over or under) whose land the Project is proposed to pass.



- Owners of conservation easements on land on whose land the Project is proposed to pass (including over or under), as the SEC has not distinguished between a fee simple interest and a conservation easement. Both are legitimate real property interests.
- Property owners (fee simple) whose property abuts a property on which the Project is proposed to pass (including over or under) or who abut a road on which the Project is proposed to follow.
- Governmental entities (such as select boards, planning boards, and conservation commissions) of Towns involving the Project.
- Governmental entities of abutting towns.

Permissive Intervention

Permissive intervention is when the SEC has the discretion to grant or deny intervention, and decides to grant it. The following types of intervenors are likely to be granted intervenor status through the SEC's permissive intervention authority:

- Property owners (fee simple and conservation easements) not abutting a property or road on which the Project is proposed, but whose property is within several miles of the Project, especially if the Project will be visible from their property.
- Non-profit organizations, especially if they possess special, helpful knowledge or whose mission may be directly affected by the Project.
- Former town officials of Project Towns.
- Business competitors of a Project.

Possibly No Intervention

The following types of intervenors might be denied intervention:

- Property owners (fee simple and conservation easements) who are more than several miles from the Project.
- Interested individuals without property in close proximity to the Project and who have only general concerns about the Project but no "substantial interest" in the SEC's decision.



The SEC often groups similarly situated intervenors, as provided for in the SEC's administrative rules. Such groups are likely to be required to combine their presentations of evidence and argument, cross-examination, and other participation in the proceedings. The group is likely to also be required to designate a representative who files documents, cross-examines witnesses, and otherwise represents the group. Such "representation" may be problematic for a party that is represented by counsel. Therefore the status of *pro se* versus represented-by-counsel may be an additional factor the SEC considers when grouping parties.

Nothing prohibits would-be intervenors from proposing certain groupings. An alternative to separate parties being grouped **by** the SEC would be separate parties joining together as a group and then seeking intervention. The SEC may welcome such a request if it assists in the orderly and prompt conduct of the proceedings. The more that groups organize themselves and file petitions to intervene as already formed groups, the more likely the SEC might be to grant those petitions. It is advisable for those groups to be represented by attorneys who represent the entire group, and this **may** alleviate the problems that arise when *pro se* and represented parties are combined into one group.

What an Intervenor Needs to Prove?

Once an application is accepted and petitions to intervene are decided, an adjudicative proceeding is conducted. The proceeding involves pre-filed testimony, site visits, discovery, motions, objections, hearings with testimony and cross-examination, post hearing briefs, and public deliberations by the SEC. Finally, the SEC will reach a decision.

When reaching a decision, the SEC considers all relevant information regarding potential siting or routing of a proposed facility, including potential and significant impacts and benefits, and determines if issuance of a certificate will serve the objectives outlined in RSA 162-H:16, which reads:

In order to issue a certificate, the committee shall find that: (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate; (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies; (c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety; (d) Repealed; and (e) Issuance of a certificate will serve the public interest.



It is very important that would-be intervenors, either in support or in opposition to a project, take note of these criteria. In order to make a compelling argument, a would-be intervenor should tie its position to these criteria, as the case for intervention is strongest when a petitioner can demonstrate either a “substantial interest” (such as a property interest) that will be affected by the SEC’s decision or the possession of specialized information that the SEC would deem helpful to its evaluation of the statutory criteria listed above.

