From: Christopher Bray [cbray@sover.net]
Sent: Wednesday, June 08, 2016 5:21 PM
To: Springer, Darren
Subject: Fwd: S.230--helpful background information
Attachments: PSB Memo 5.24.16.pdf; ATT00001.htm; Lunderville email RE S230.pdf; ATT00002.htm; Engineering Assessment on Sound Standard .pdf; ATT00003.htm

Begin forwarded message:

From: Christopher Bray <CBray@leg.state.vt.us>
Subject: S.230--helpful background information
Date: Jun 8, 2016 at 4:16:28 PM GMT-4
To: ALL_MEMBERS <ALL_MEMBERS@leg.state.vt.us>

Dear Senate and House Colleagues,

As we prepare to return to Montpelier tomorrow, I want all of us to have the most complete information possible to guide us in our analysis and decision making.

One of the questions being asked by legislators is "How accurate and meaningful are the concerns expressed in the governor's veto message?"

Our own legislative council has produced some careful documentation on this point. It has already been circulated to members of the General Assembly. We have not heard, however, any direct response from the Public Service Board nor any of the utilities with first hand experience in the issues under discussion.

Following a public records request, I have three documents to share with you, and they provide insight into the concerns of those affected by S.230. These documents include:

- a memo from the Public Service Board, which is charged with rulemaking on sound in S.230;
- an email from Neale Lunderville, General Manager of the Burlington Electric Department; and
- an email from the engineers that evaluate sound issues for Green Mountain Power.

Taken together, these documents reveal that those who will actually perform the rulemaking (the PSB), or be effected by the law (Burlington Electric Department and Green Mountain Power), have concerns serious enough that I believe we should clarify the language in S.230 in order to avoid the problems they enumerate.

The achievability of this clarification is reflected in the draft bill I sent all legislators on Monday: in a 43 page bill there are only 14 changed lines, and one section is re-inserted. The changes are very narrow, maintain all the original provisions, and precisely correct the ambiguities which caused the veto.

While there is a great temptation to be pulled into the politics of this situation, I hope we will avoid that pitfall and focus on our legislative duty to produce the best laws we can for the citizens who rely on us. We have a simple clerical task awaiting us tomorrow—and, having reviewed the journals of past legislative veto and special sessions, I know that we can complete our work with diligence in a single day.

Respectfully,
—Chris Bray

Chair, Senate Natural Resources and Energy

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State of Vermont
Public Service Board

MEMORANDUM

Re: S. 230

Date: May 24, 2016

I have reviewed S.230 in anticipation of its implementation by the Vermont Public Service Board ("Board"). This memorandum records my observations about certain legal implications that follow from this statute.

S. 230 requires the Board to adopt rules regarding sound from wind turbines by July 1, 2017. More immediately, though, the Board is required to adopt temporary sound rules using emergency rulemaking procedures within 45 days from the date of passage of S. 230. Specifically, Section 12(b) of S. 230 provides:

> On or before 45 days after the effective date of this section, Board shall adopt temporary rules on sound levels from wind generation facilities using the process under 3 V.S.A. §844. The rules shall be effective on adoption and shall apply to applications for such facilities under 30 V.S.A. §248 filed on or after the effective date of this section. Until the Board adopts temporary rules pursuant to this subsection (b), the Board shall not issue a certificate of public good for a wind generation facility for which an application is filed on or after the effective date of this section.

1. Temporary Rulemaking Requirement (Sec. 12(b)(1) of S.230)

In adopting temporary rules for sound levels from wind generation facilities, the Board must be mindful of how Sec. 12(b) differs from ordinary emergency administrative rulemaking that is governed by 3 V.S.A. §844. The essential difference is found in Section 12(b)(1), which removes the "public peril" determination that otherwise would be a prerequisite for the Board to invoke its emergency rulemaking authority under Section 844(a).

By law, agencies such as the Board are vested with the discretion to invoke emergency rulemaking powers to quickly address "imminent peril." Specifically, Section 844 provides in relevant part:

> (a) Where an agency believes that there exists an imminent peril to public health, safety, or welfare, it may adopt an emergency rule. The rule may be adopted without having been prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. The agency shall make reasonable efforts to ensure that emergency rules are known to persons who may be affected by them.

The Vermont Supreme Court had held that courts have the jurisdiction to review an agency determination that a sufficient "imminent peril" exists to warrant adopting an emergency rule. Such determinations are subject to review under an abuse of discretion standard.[1]

Section 12(b)(1) of S. 230 provides that "Rules issued pursuant to this subsection (b) shall be deemed to meet the standard under 3 V.S.A. §844(a)." The underlined language above in Section 844(a) is reasonably read to be "the standard" referred to in Section 12(b)(1). That "standard" is whether the agency believes that an imminent peril exists to public health, safety, or welfare, subject to judicial review for agency abuse of discretion. Furthermore, Section 844(a) may reasonably be read to contain no other "standard" beyond this underlined language because the remaining provisions of that statute prescribe the process that governs the adoption and implementation of emergency administrative rules. Thus, on its face, Section 12(b)(1) removes the statutory prerequisite in Section 844(a) for invoking emergency rulemaking powers, namely, the necessity for an agency (in this case, the Board) to "believe" that there exists an imminent peril to public health.

The meaning of the legislative decision to remove this prerequisite is open to debate. One view may be that Section 12(b) does not contemplate "emergency rulemaking" at all, but rather is simply directed at effectuating a rapid adoption of a temporary sound standard "using the process under 3 V.S.A. §844" (emphasis added) until such time as permanent rules are put in place. Under this view, the process of Section 844 would be followed without requiring an "imminent peril" determination. However, this interpretation of Section 12(b) does not account for the additional language of Section 12(b)(1), which specifically states that rules issued pursuant to Section 12(b) "shall be deemed to meet the standard under 3 V.S.A. §844(a)" (emphasis added). The use of a process is not necessarily understood to be interchangeable with meeting a standard that is a threshold for using that process, especially in a context where the standard otherwise

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1. *Hunter v. State*, 2004 VT 108, ¶46 (collecting cases concerning emergency administrative rulemaking and judicial review of agency process and "public peril" determinations for whether they were arbitrary, capricious, unreasonable or not supported by substantial credible evidence).

serves to guide judicial review of whether an agency has properly exercised its discretion in invoking the emergency rulemaking process.

Another view of Section 12(b)(1) is that it functions as a legislative determination that the sound emissions from wind generation projects "meet the standard under 3 V.S.A. §844," meaning, the legislature believes such sound to be an "imminent peril" to public health, safety, or welfare in Vermont, and that the legislature has responded to these urgent circumstances by directing the Board to adopt temporary sound standard rules that "shall be deemed" to meet the "standard" in Section 844 for emergency rulemaking. Significantly, the legal effect of the "shall be deemed" language is that it forecloses judicial review (and the attendant risk of protracted litigation) of whether an "imminent peril" exists to warrant the use of the emergency rulemaking process. Such an outcome would be consistent with the objective of quickly implementing a temporary rule to establish sound standards for wind generation projects, notwithstanding the elimination of the opportunity for judicial review of whether the "imminent peril" standard has been met. In turn, the abrogation of judicial review suggests that the Legislature has decided as a matter of law that sound emanating from wind generation projects is to be considered an "imminent peril."

Leaving aside the ultimate merits of these competing views regarding the implications of the Legislature's decision to direct the Board to adopt temporary sound rules using emergency rulemaking procedures without first establishing the existence of a "public peril," it bears noting that the "shall be deemed" language in Section 12(b)(1) may give rise to litigation such as proceedings for injunctive relief on the theory that the Vermont Legislature has declared sound from wind generation projects to be a public peril.

Finally, I am aware that there are several recent instances where the General Assembly has used the "deemed to meet the standard under §844(a)" language to direct an agency to perform temporary rulemaking quickly.[2] This practice appears to be an outgrowth of guidance offered in 2013 by the Legislative Committee on Administrative Rules, which recommended the use of this approach in situations where rulemaking needs to be done quickly, even when "the circumstances do not meet the normal statutory criteria for emergency rulemaking ... ."[3] These enactments all contain explanations of time-sensitive purposes and objectives to be met by proceeding under the emergency rulemaking process. In general, a temporary rule was deemed to be needed and time was of the essence because there were detrimental programmatic consequences to be averted, such as conflicts with federal law or failure to protect confidential information.

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2. *See* 2016 Acts and Resolves No. 58, Sec. E.306 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations); 2014 Acts and Resolves No. 195. Sec. 2, enacting 13 V.S.A. § 7554c(d)(3) (control of confidential information re pretrial risk assessments); 2014 Acts and Resolves No. 179, Sec. E.306.1 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations); 2013 Acts and Resolves No. 79, Sec. 51 (conform Vt. Health Benefit Exchange rules to federal guidance and regulations); 2010 Acts and Resolves No. 156, Sec. E.309.14 (changes to Medicaid coverage).

3. Memorandum from the Legislative Committee on Administrative Rules dated January 17, 2013 (describing rulemaking categories and process).

These circumstances may not have met the "normal" statutory criteria for emergency rulemaking, but they nonetheless reflect the existence of an urgent need for swift, rule-based regulation in order to protect public policy interests and the individuals affected by those policies. In other words, the General Assembly's practice may reasonably be understood to have broadened the scope for acceptable circumstances that justify the use of emergency rulemaking, as opposed to representing a legislative practice that simply "borrows" the emergency rulemaking process without reference to an underlying urgent cause that seeks to protect the public good.

While Section 12(b)(1) contains no express explanation for why the Board is being directed to adopt either temporary or permanent sound rules, the record of the legislative context within which S. 230 was promulgated reflects that the Legislature considered the health impacts of sound from wind generation facilities.[4] Should the need arise for a court to examine the legislative intent behind the enactment of Section 12 of S. 230, this record could be used to support a legal argument that Section 12(b)(1) reflects a legislative determination made in Vermont that sound emanating from wind generation facilities constitutes a matter of sufficient urgent public interest to warrant the adoption of emergency temporary rules, followed by permanent rulemaking.

2. Emergency Rule Sound Standards (Sec. 12(b)(3) of S. 230)

In establishing temporary sound standards pursuant to Section 12(b)(3) of S. 230, the Board is directed to ensure that these rules do not "allow sound levels that exceed the lowest maximum decibel levels authorized in any certificate of public good that contains limits on decibel levels issued by the Board for a wind generation facility before the effective date of this section." Thus, on its face, Section 12(b)(3) does not afford the Board any discretion to set sound standards that vary according to the particular attributes of a wind generation project, such as generation capacity, site location, setbacks or local topography.[5]

To date, the following standard represents the lowest maximum decibel level authorized in a Certificate of Public Good ("CPG") for a wind generation project: "Noise from the turbine shall not increase the ambient sound level measured at the residence of

4. *See, e.g.*, Comments of Dr. Ben Luce submitted on February 10, 2016, to the Senate Committee on Natural Resources and Energy at p. 39-46; Comments of Brian Dubie submitted on March 10, 2016, to the Senate Committee on Natural Resources and Energy; Comments of Dr. Harry Chen submitted on April 7, 2016, to the Senate Committee on and Welfare.

5. This conclusion is further borne out by the contrast with Section 12(a) of S.230, which contains language that affords the Board great discretion to consider such variables in complying with the statutory mandate to adopt permanent sound standards for wind generation projects.

any adjoining property owner by more than 10 decibels [dB(A)]."[6] Additionally, for purposes of the order issued in NM-401 that imposed this sound standard, the Board stated that the term "ambient sound" would be considered to be "the level that is exceeded 90% of the time that the noise measurements are taken."

By comparison, the sound standards for much bigger wind generation projects that have received Section 248 CPGs have differed significantly from the "ambient plus 10 dB" standard established in NM-401. For example, for the Lowell Mountain wind generation project (63MW), the project-related sound levels at any existing residences are not permitted to exceed 45 dBA (exterior)(Leq)(1 hr) or 30 dBA (interior bedrooms)(Leq)(1 hr).

Thus, as applied, Section 12(b)(3) requires that, as long as the temporary rules remain in effect, Section 248 CPG for all wind generation projects— whether they generate 10 kW or 63 MW—must impose a sound standard (ambient plus 10 dB) that was developed for small-scale wind projects.

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6. CPG NM-401, Application of Frank and Judy Cole for an Amended Certificate of Public Good for a Net Metered Wind Turbine and Photovoltaic System, Order of 6/16/2011 at 2 (approving a CPG for a 2.5 kW wind generation system). This sound standard has been included in at least two other wind generation CPGs issued after the NM-401 CPG was issued in 2011. Like the NM-401 project, both of these subsequent projects were small-scale wind generation facilities. See CPG NM-1646, Order of 12/2/2011(100 kW); CPG NM-1978, Order of 7/11/2012 (10kW).

From: **Springer, Darren** Darren.Springer@vermont.gov
Subject: FW: S.230
Date: Jun 8, 2016 at 2:28 PM
To: Brian Campion (BCampion@leg.state.vt.us) BCampion@leg.state.vt.us, Christopher Bray (CBray@leg.state.vt.us) CBray@leg.state.vt.us, Christopher Bray (cbray@sover.net) cbray@sover.net, campionvt@gmail.com, senatorayer@gmavt.net, Virginia Lyons (senatorginnylyons@gmail.com) senatorginnylyons@gmail.com

See below analysis from Neale Lunderville, General Manager of Burlington Electric, on the Property issue and the Emergency Rules.

Darren M. Springer
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Please note: My email address has changed to Darren.Springer@vermont.gov.

From: Lunderville, Neale [mailto:nlunderville@burlingtonelectric.com]
Sent: Tuesday, May 24, 2016 8:47 AM
To: Springer, Darren <Darren.Springer@vermont.gov>
Cc: Nolan, Ken <knolan@burlingtonelectric.com>; Kanarick, Mike <mkanarick@burlingtonelectric.com>
Subject: S.230

Hi Darren,

BED has been reviewing the provisions of S.230 as passed by the Legislature. We are offering our thoughts below.

Attaching CPG to Property Deed

BED has identified a significant concern with the bill, specifically the new section 248(a)(7) regarding attaching a CPG to a property deed. Under this new provision the holder of a CPG must file a notice of the CPG on the land records of the municipality in which the project is located. The CPG-holder would be listed as the grantor on the land records, and while not clear in the bill, the owner of the land on which the project is located would presumably be listed as the grantee. When a prospective purchaser conducts a title search, they would then be on notice that the land is encumbered or benefitted by the presence of a certificated generating facility (depending upon the purchaser's point of view).

BED's understanding is that the PSB's jurisdiction would only extend to the holder of the CPG, not the underlying property owner. However, it is an open question as to what happens if the CPG holder is not in compliance with the CPG, or abandons a project and walks away.

In the case of a property sale, the title searcher would now need to conduct some due diligence by contacting the PSB or DPS to see if the project is in compliance with the CPG, which could increase the cost of the real estate transaction for the buyer. Further, if the project is not in compliance it could negatively impact what a prospective purchaser would pay for the property. This could also be considered an encumbrance by the title insurance company, which would either be exempted from coverage under the title policy or insured at a higher cost

would either be exempted from coverage under the title policy or insured at a higher cost.

BED also reached out to the Vermont Attorneys Title Insurance Company to gain their thoughts. Although they were unaware of the specifics of the bill, when we explained our understanding of what the legislation provided, they indicated that they would probably treat the notice of a CPG as an encumbrance that would be excepted from coverage under the policy. This would put the onus on the property owner to determine what risk they were willing to take with respect to the presence of a certificated generating facility on their property. They also confirmed our belief that in the event a developer walked away from a facility, it would be incumbent upon the property owner to take whatever steps necessary to clear the encumbrance, such as proceeding through the PSB process to have the CPG revoked.

The bottom line: our research on this provision of S.230 indicates that: (i) a property owner with an attached CPG will have more hoops to jump through in order to sell their property; (ii) the cost of property transactions where CPGs are involved will likely increase; and (iii) property owners may have more liability for out of compliance CPGs then they had understood when they signed agreements with developers. (Standard caveat: our findings should be vetted by attorneys with specific expertise in real estate transactions and title searches.)

BED has a strong commitment to seeing solar projects constructed in Burlington and around Vermont, particularly residential scale arrays. BED is concerned that this significant change in the relationship between project developers and project hosts could complicate property transactions in Vermont and act as an anchor on future small scale renewable development. BED believes that this change is <u>not</u> in our customers' best interest.

<u>Use of Emergency Rules</u>
S.230 section 12(b) calls for emergency rulemaking per 3 VSA § 844. In our view, this is a non-standard use of this section of statute as it pertains to energy projects.

Regardless of whether you agree with noise standards or not, emergency rulemaking is designed for *emergencies*, not simply the normal exigence of political or policy decisions. By stating in subsection (b)(1) that the Board's temporary rules "shall be deemed to meet the standards of 3 V.S.A. s844(a)," the Legislature, in effect, has determined that noise from wind generation facilities is "an **imminent peril** to public health, safety and welfare." [Emphasis added.]

Based on our review, this temporary rulemaking would not create an immediate issue for *existing* wind projects. S.230 states that the temporary rules would apply to "applications… filed on or after the effective date of this section," which would be upon passage. By S.230's express terms, the new rules would apply only to applications filed on or after the date of passage. To the extent there are any wind projects presently in the queue, no CPG would be issued for those projects until the temporary rules are in effect.

We hope that these observations are helpful as you review S.230.

Thanks,
Neale

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Follow us online:

From: **Springer, Darren** Darren.Springer@vermont.gov
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Date: Jun 8, 2016 at 2:25 PM
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The analysis below is from Ken Kaliski at RSG, the sound consultant expert for Green Mountain Power:

For the Vergennes project, “ambient sound level” was defined in the application (CPG #NM-1646) as “the level that is exceeded 90% of the time that a noise measurement is taken.” This is the 10th-percentile sound level or what is commonly referred to as an L90 in the field of acoustics.

With regards to Kingdom Community Wind, the preconstruction nighttime L90’s ranged from 16 dBA to 37 dBA. At the Nelson Farm near the stream, the L90 was 35 dBA, but further from the stream it was 19 dBA. It is fair to say that the L90 is heavily influenced by local sources. At the end of Irish Hill Road, the nighttime L90 was 19 dBA. All of these our overall numbers. The lowest hourly L90s were even lower.

Based on these results, it is my opinion that the KCW project could not have been built if this standard were in place.

However, those L90s are measured during very calm times when the wind turbines may not have been operating. We will review the KCW test data to see if, in actual operation, KCW would have exceeded the standard. This brings up another issue in preconstruction permitting, which is that determining exceedance is an exercise in the statistical probability of background L90 being 10 dB below turbine operations. Thus, we now have two models – one of L90 and one of the turbine.

There are many other problems with standards based on background L90s. Here are just a few:

- The developer has no control of the background L90. What if you permitted a project, then the nearby farm’s fans shut down. The background level drops by 5 dB and suddenly you are out of compliance.
- There is no way to determine the background level at all locations and all times of the year. What if you measured at house x, but house y complains. House 7 has a lower background sound level. You are then out of compliance. Or, you measure the L90 under one set of conditions, but it changes throughout the year.
- The incentives for siting are the exact opposite of what is desired. You are incentivized to place wind turbines where there is more background noise – that is, generally, where there is more people. Instead, it is better to put these in more remote areas away from people, but this is where the background sound level is lowest.
- There is no scientific justification for the 10 dB above ambient standard for use in rural areas.

Sent from my iPhone