

From: Cheney, Margaret [Margaret.Cheney@vermont.gov]
Sent: Tuesday, May 24, 2016 4:34 PM
To: Springer, Darren
Subject: Fwd: General counsel memo
Attachments: PSB GC Memo re S230 0524_001.pdf; ATT00001.htm

Is attached



**State of Vermont
Public Service Board**

MEMORANDUM

To: James Volz, Margaret Cheney, Sarah Hofmann

From: June E. Tierney, General Counsel 

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

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.

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.

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).

