UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Vermonters for a Clean Environment, Inc., Justin Lindholm, Annette Smith, John David Geery, Thomas E. Shea, George S. Halford, Kathy Halford, and Tyler Resch,	)	
Plaintiffs,	)	
v.	)	File No. 1:12-CV-73
Colleen Madrid, Forest Supervisor of the Green Mountain National Forest, Bob Bayer, Project Coordinator of the Deerfield Wind Project, Manchester District, Kathleen Atkinson, Regional Forester of the Eastern Region, in their official capacities as employees of the U.S.D.A. Forest Service,	)	
Defendants.	)	
Deerfield Wind, LLC	)	
Defendant-Intervenor	)	

First Amended Complaint

I. Introduction:

1. This is a civil action brought by the conservation organization Vermonters for a Clean Environment, Inc., as well as seven concerned Vermonters, and an abutting property owner whose primary residence is in New Hampshire, against the Green Mountain National Forest Supervisor and two other U.S.D.A. Forest Service officials.

2. The lawsuit, which is based on the Administrative Procedures Act, the National Environmental Policy Act and the Wilderness Act, asks this Court to stop the Forest Service from issuing a special use permit to a developer (Defendant-Intervenor,

Deerfield Wind, LLC) to construct the Deerfield Wind Project and to enjoin it from conducting or allowing any building of roads or trails, clearing of land, cutting of trees, blasting, excavation or other construction activities associated with the project.

II. Factual Background and Procedural History:

3. The proposed Deerfield Wind Project consists of 15 wind turbines, each of which would be over 400 feet tall and approximately 16 feet in diameter at its concrete base, to be constructed on currently pristine mountain ridgelines on either side of Vermont Route 8 in the Vermont Towns of Searsburg and Readsboro.

4. On or about January 3, 2012, the Forest Service issued a Final Environmental Impact Statement and Record of Decision, selecting Alternative Two, "Reduced Turbines in the Western Project Site," which would permit the authorization (by agency issuance of a special use permit) and use of the Green Mountain National Forest for the installation of a wind turbine facility.

5. Plaintiffs Vermonters for a Clean Environment, Inc., Justin Lindholm, and Thomas Shea separately and timely filed administrative appeals seeking to overturn the Forest Service's decision. They requested that the Forest Service abandon the project entirely, and in the alternative, that it further study the environmental impacts of the wind turbines before proceeding further.

6. The Forest Service denied the administrative appeals on April 9, 2012. Plaintiffs, having exhausted their administrative remedies, filed this lawsuit on April 13, 2012 (Doc. 1), seeking this Court's intervention to enjoin the issuance of the special use permit and construction of the wind turbine facility.

7. The Defendants filed their Answer on June 22, 2012. (Doc. 22.)

8. The wind-turbine developer, Deerfield Wind, LLC, moved for permission to intervene on June 29, 2012 (Doc. 25), which motion was granted by Court Order on August 7, 2012. (Doc. 37.)

9. On September 26, 2012, Plaintiffs filed a motion for summary judgment (Doc. 45), which neither Defendants nor Defendant-Intervenor has yet opposed.

III. Proposal for Larger Turbines and Litigation Stay:

10. Approximately two months after entering its appearance in this case, Defendant-Intervenor, through its representative Neil Habig, requested permission from the Forest Service to construct larger wind turbines--with longer blades--than had previously been approved for use in the Record of Decision. (Administrative Record [A.R.] 18B.00011-12.)

11. In a memorandum submitted to the Forest Service on October 8, 2012, Mr. Habig represented that "Deerfield Wind is hereby providing notice of a change in the combination of Gamesa turbines that is planned to be deployed at the Deerfield Project. The Gamesa G80/G87 configuration, submitted to the Forest Service in 2008 is no longer viable. The change is necessitated by Gamesa discontinuing the manufacture of the G80, and the availability of a newly designed G97 turbine." (*Id.*)

12. Despite Mr. Habig's representation, as of September 25, 2013, Gamesa continues to market the G80 turbine model through its web site. http://www.gamesacorp.com/en/products-and-services/gamesa-g80-20-mw-en.html (Last checked, September 25, 2013, at 2:17 p.m.)

13. Following Defendant-Intervenor's request to increase the size of its turbines, the Defendants moved to stay this case on November 2, 2012, with the consent of the other parties. (Doc. 52.) The motion to stay was granted by Court Order on November

5, 2012, "until the Forest Service [. . .] issues a Supplemental Information Report. . . ." (Doc. 53.)

14. The Forest Service issued a Final Supplemental Information Report on July 23, 2013 (FSIR), the effect of which was to accept, in whole, Defendant-Intervenor's proposal to construct larger turbines. (A.R. 18F. 00061-90.)

15. Whereas the formally approved turbines would have stood at 389 feet (G80s; five on eastern ridge) and 401 feet (G87s; two on eastern ridge and eight on western ridge), the new turbine configuration calls for all G97 turbines on the western ridge (eight turbines of 415 feet) and all G90 turbines on the eastern ridge (seven turbines of 401 feet). (A.R. 18F.00064.)

16. The Forest Service approved the Defendant-Intervenor's proposal, in spite of a number of comments from concerned parties, questioning the wisdom of constructing still larger turbines in the Green Mountain National Forest.

17. For instance, in a letter from its general counsel, Catherine J. Gjessing, Esq., the Vermont Agency of Natural Resources - Department of Fish and Wildlife observed that "the proposed rotor change increases the actual surface area of the Deerfield Wind Project by nearly 20% . . . . The effects of blade length should not be ignored." (A.R. 18E 00038-39.) Ms. Gjessing concluded, "[t]he Forest Service should consider the estimated takings data of 14.165 bats/turbine from Sheffield [another wind project in Vermont with nearly identically sized turbines], the nearly 20% increase in avian collision risk, and the decline in brown bat and long-eared bat populations in deciding whether to grant the change in blade length for the Deerfield Wind Project." (*Id.*, at 18E 00039.)

18. The United States Department of the Interior, National Park Service likewise expressed concerns with a report relied on by the Forest Service in determining to approve the Defendant-Intervenor's request: "On page 3 of the EDR report the authors state that changes in sound levels of 3 dB are considered undetectable or barely perceptible. NPS does not agree with this statement. . . . [A] 3 dB increase would cause a bit more than a 40% increase in percent highly annoyed. It is also at odds with the masking effects on noise, in which a 3 dB increase, in most circumstances, will halve the area in which some sounds can be heard . . . a more balanced presentation will enhance the credibility of the analysis." (A.R. 18E.00029.)

19. Plaintiffs Justin Lindholm (A.R. 18E.00007-8) and Vermonters for a Clean Environment, Inc. (A.R. 18E.00017-35) also submitted comments opposing the increase in turbine size.

20. Notwithstanding the concerns voiced by the federal and state agencies and a number of others, the Forest Service, in the FSIR, determined that "no new or modifications to existing mitigation measures or monitoring and research activities" would be required, and declined to require any supplement to the FEIS. (A.R. 18F. 00085-86.)

IV. <u>Environmental Impacts</u>:

21. The ridgelines in question range in elevation from 2,750 to 3,100 feet above sea level. To construct the project, the developer would have to blast away the ridge-tops and pave over a large forested area. The amount of blasting necessary would be extensive; the Forest Service has estimated the soil depth on the ridgelines at less than 40 inches. According to the Agency, the cuts needed for construction would be up to 25 feet in depth, and the turbine pads would be buried to a depth of seven to ten feet.

22. During the construction phase, approximately 4.45 miles of new roads and 1.03 miles of "improved" roads would be built. The roads would be up to 36-feet wide to accommodate tractor trailers, heavy equipment, and the wind towers and turbines themselves. Road grading on the sides of the roads would range from five to ten feet, with additional clearing of trees 20 to 30 feet on each side, for a total maximum possible width of 106 feet. A total of 46.2 acres would be cleared.

23. To comply with Federal Aviation Administration rules, seven of the wind turbines would be artificially illuminated at night with blinking lights, thereby substantially increasing their visibility from surrounding areas.

24. If constructed, this would be the first time that a privately owned and operated wind turbine project will have been authorized and built on publicly owned lands administered by the Forest Service.

25. The Deerfield Wind project area includes the Lamb Brook area, which is located on the east side of Vermont Route 8. Lamb Brook was the subject of earlier litigation in this Court in a related case, *National Audubon Society v. Hoffman*, Civil Action No. 5:94 cv 160. In 1995, this Court issued an injunction, which is still in place, prohibiting the Forest Service from timber-cutting and road-building in Lamb Brook.

26. This Court's primary concerns in the prior case were that a proposed Forest Service timber sale would have a significant negative impact on Lamb Brook's black bear and neo-tropical migratory songbird habitat, and that the mitigation measures proposed by the Forest Service would be ineffectual. This Court's decision, authored by U.S. District Court Judge J. Garvan Murtha, may be found at 917 F.Supp. 280 (D. Vt. 1995). The Court of Appeals affirmed this Court's decision in substantial part two years later; that decision is published at 132 F.3d 7, 21 (2d Cir. 1997). It ordered this Court to direct

the Forest Service "to address the [environmental] issues discussed [in the opinions] and reassess the environmental significance of the Lamb Brook Project in light of these issues."

27. On remand, this Court, issued an order dated March 5, 1998, which provides, in relevant part:

> i. In light of the substantial affirmance of this Court's opinion and the assessments required on remand to the Forest Service, this Court finds continuation of the injunction is appropriate. ¶Accordingly, this matter is hereby remanded to the Forest Service for further consideration consistent with the opinions of the Second Circuit and this Court. The Forest Service is further enjoined from conducting any further timber harvesting or road-building activities in Lamb Brook until it has complied with the directives of the Second Circuit and this Court.

28. The Forest Service has neither complied with the terms of the injunction nor petitioned this Court for relief from its provisions.

29. The Deerfield Wind Project would result in the removal of 36 acres of bear-scarred beech trees and 350 to 360 individual bear-scarred beech trees. It is well-known that beech nuts are a primary food source for black bears in Vermont. The Vermont Department of Fish and Wildlife and the Forest Service has made clear that the Deerfield Wind project area is extremely important black-bear habitat, some of the best in Vermont.

30. The wind turbines would be erected 1.3 miles from the George D. Aiken Wilderness at their nearest point. The Aiken Wilderness is a 5,060-acre Congressionally-designated Wilderness Area, named after a beloved Vermonter who served our state both as Governor and later as a United States Senator for 41 years. The Deerfield Wind Project turbines and their lights would be visible from hills throughout

the Aiken Wilderness, particularly given their eye-catching whirring motion, and would also be heard there, particularly during the months of the year when there are no leaves on the trees.

31. Construction of the 15 turbines would destroy or significantly impair the wilderness values of the Aiken and render it a semi-industrial zone. The massive scale of the machines is such that, if each 400-foot-plus wind turbine were instead a Ferris Wheel (an analogous structure), it would qualify as the fourth-tallest Ferris Wheel in the world. By way of comparison, the eight G97 turbines (at 415 feet tall) would tower over the Bennington Battle Monument (306 feet) and the Statute of Liberty (305 feet) by more than 100 feet.

32. Each wind turbine would kill an undetermined number of bats, four species of which are endangered or threatened in Vermont, and one of which is federally endangered; three species may be federally listed as threatened or endangered soon. The U.S. Fish and Wildlife Service has recently estimated that white-nose syndrome has already killed 5.7 to 6.7 million bats, and the Forest Service did not have that information available to it when it issued its Final Environmental Impact Statement and Record of Decision. The FEIS and ROD are based on a much lower figure of bat mortality from white-nose syndrome, in the area of only about one million bat deaths. With the new information from the Fish and Wildlife Service on total bat deaths, the environmental impact of each bat death caused by the wind turbines will be commensurately greater.

33. Though extensive blasting will be necessary to excavate and flatten the ridgelines sufficiently to erect the wind turbines, the Forest Service performed no site-specific study, and issued no site-specific rules or guidelines in the FEIS, on ways to

conduct the blasting safely or to mitigate its effects, instead abrogating that responsibility to an as yet unknown blasting contractor.

V. Forest Service Failure to Adhere to NEPA Requirements:

34. The FEIS was drafted by a consultant who was hired and paid for that work by the developer of the Deerfield Wind Project (Deerfield Wind, LLC, and its parent companies, Iberdrola Renewables, Inc. and Iberdrola, SA). The FEIS is based in large part on, and incorporates, earlier studies conducted by consultants who, using those same studies, advocated for the developer during the permitting process for the Deerfield Wind Project before the Vermont Public Service Board.

35. Sections of the FEIS are directly plagiarized from studies submitted by the Deerfield Wind Project developer's consultants to the PSB. In this and in other ways set forth *infra,* the NEPA process was rigged to favor a predetermined outcome: the proposal favored by the developer and approved by a divided PSB vote.

36. The studies referenced in the FEIS on impacts to the Aiken Wilderness were authored by the developer's consultants, and are incomplete or misleading. The developer's consultant who authored the visual impact study admittedly visited only a few parts of the Aiken where the wind turbines would be visible. Her study claimed, without any scientific or common-sense basis, that visitors to the Aiken would not look at the ridgelines, but would focus their attention on other parts of the landscape. It attempted to justify the visual impacts by claiming that the wind towers would be visible only during periods of the year when the leaves were off the trees – the very time when the FEIS concedes that there are the most visitors to the Aiken.

37. The developer's consultant who drafted the noise study failed to place any sound receivers from points within the Aiken Wilderness, and hence his conclusion, that

the wind turbines would cause only a 7 dba maximum increase in noise levels within the Aiken, is without any rational or scientific basis. Moreover, the developer's consultant made the patently false claim that wind turbines have a natural sound, rising and falling like the wind, when the truth is that the turbines have a mechanical sound very similar to that of jet engines.

38. The Forest Service's treatment of the Purpose and Need for the Deerfield Wind Project, combined with its unduly and irrationally narrow selection of a NEPA Range of Alternatives, so skewed the analysis as to make the selection of the Deerfield Wind Project favored by the developer an inevitability. One of the alternatives had been rejected previously by the Vermont PSB, and hence it was not viable. Another alternative had been rejected by the developer as economically unfeasible. This left only two real alternatives: the No Action Alternative and Alternative 2, "Reduced Turbines in the Western Project Site," which the Forest Service selected.

39. The Forest Service arbitrarily and capriciously failed to examine another area on the Green Mountain National Forest in Readsboro, Site 35, on the purported ground that it was too similar to the site ultimately selected. However, Site 35 is significantly farther away from the Aiken Wilderness than the site chosen by the Forest Service, and it is reasonable to conclude that if placed there, the project's impacts on the Aiken, including visual and noise impacts, would have been much less.

VI. The Parties and Standing:

40. Vermonters for a Clean Environment, Inc. is a Vermont non-profit corporation and membership environmental organization. Its members are united in the belief that Vermont's future lies in conserving its clean, rural environment. They have joined together to pursue the common goals of encouraging economic development

with minimal environmental impacts and preserving Vermont's natural beauty. VCE opposes the Deerfield Wind project as antithetical to its values and mission. VCE's members include plaintiff and VCE founder and Executive Director Annette Smith, as well as plaintiffs Justin Lindholm, John David Geery, Thomas Shea, and George S. ("Steve") Halford and Kathy Halford.

41. Plaintiff Justin Lindholm is a resident of Mendon, Vermont. He is the retired former owner of a sporting goods store in Rutland, and is currently a member of the Vermont Fish and Wildlife Board, appointed to that post by Governor Peter Shumlin. (He is suing in his individual capacity only, however, and we mention this post for identification purposes only.) Mr. Lindholm is a wilderness enthusiast, hiker, and snowshoer who has visited the Deerfield Wind Project area many times. He has a particular affinity and affection for the Aiken Wilderness, which he hikes and snowshoes regularly, and he intends to continue to go there for those purposes. In Mr. Lindholm's opinion, the Aiken Wilderness will no longer be a wilderness if the Deerfield Wind Project is built, and his enjoyment of what he views as a special and inspiring place will be significantly impaired or destroyed.

42. Plaintiff Annette Smith resides on a small farm in Danby, Vermont, and is the Executive Director of VCE. Ms. Smith has visited and hiked the Deerfield Wind Project area, including the Aiken Wilderness and the Lamb Brook area, and she intends to do so again. She believes that the wild and natural qualities of the area will be destroyed by the proposed development, and that the building of roads, blasting away of mountain ridges, and erection of enormous, noisy, and electrically lit turbines will turn what is now a beautiful forest into an industrial park, thereby destroying or significantly impairing the wild qualities for which she cares deeply. She is also very concerned that

bats, creatures that she cares deeply about and enjoys viewing, will be killed by the wind turbines, and she reasonably believes that, given the horrendous impact of white-nose syndrome, even one unnecessary bat death is one too many.

43. Plaintiff John David Geery is a professional photographer who lives in Clarendon, Vermont. He makes his living by crafting and selling photographs, primarily of the unspoiled Vermont landscape. Mr. Geery has hiked and photographed the Aiken Wilderness, and he intends to continue to do so. He wishes to see the Aiken preserved in its current primitive state, for both personal and professional reasons. His experience of the Aiken Wilderness and his ability to photograph it in its current state will be significantly impaired or destroyed if the wind turbines are erected.

44. Plaintiff Thomas E. Shea is a construction engineer who works in Cambridge, Massachusetts and lives in Kensington, New Hampshire. Mr. Shea owns a cabin and land in the Town of Searsburg, Vermont which he visits frequently, and which abuts the Forest Service land that comprises the Deerfield Wind Project area. Mr. Shea was raised in Searsburg, and formerly held the post of Town Auditor. He reasonably fears that if the wind turbines are constructed he will see and hear them constantly, and that they will destroy the peace and quiet he currently enjoys, and that hence their presence will reduce the value of his property.

45. Plaintiffs Steve Halford and Kathy Halford are husband and wife and are residents of Wallingford, Vermont. Mr. Halford is a retired teacher who taught Art at the Rutland High School, and Kathy Halford is retired from her former job as a cook at the Tinmouth Elementary School cafeteria. They are both members of VCE's Board of Directors. Mr. and Mrs. Halford enjoy hiking in Vermont forests, and feel a great affinity for Vermont's unspoiled ridgelines. They have hiked the George D. Aiken

Wilderness, and plan to do so again. They have visited many of the places in the Aiken where the wind turbines would be visible if the Deerfield Wind Project is built, and they reasonably believe that the Aiken's wilderness values would be significantly impaired or destroyed if the turbines are erected.

46. Plaintiff Tyler Resch is a journalist and published historian on Vermont subjects who resides in Shaftsbury, Vermont, who also was a plaintiff in the Lamb Brook litigation, *National Audubon Society v. Hoffman*. Mr. Resch has been visiting the Lamb Brook area since approximately 1965 as a hiker, hunter, and nature enthusiast. He is the Manager of the Jewell Clearing Trust, a family trust which owns land that is an in-holding within in the lands owned by TransCanada Hydro Northeast, Inc., whose lands abut the Lamb Brook area. Mr. Resch spends substantial time at a camp situated on this family land frequently throughout each year, including during deer season. He has written several of his books on Vermont history at the camp, including his history of the Town of Dorset, because he has found that the quiet and solitude he experiences there are conducive to these creative efforts. Mr. Resch intends to continue visiting his camp and the Lamb Brook area. But he reasonably fears that if additional roads and wind turbines are constructed on the Forest Service lands east of Vermont Route 8, his enjoyment of the Lamb Brook and the Jewell Clearing Trust property, and his ability to write at his family camp, will be significantly diminished or destroyed.

47. For the reasons set forth above, all of the individual plaintiffs will suffer significant and irreparable injury and harm if the Forest Service issues a special use permit authorizing the construction of the Deerfield Wind Project.

48. The defendants are Forest Service employees who were involved in the decision to allow the Deerfield Wind Project to go forward. Defendant Colleen Madrid

is the Green Mountain National Forest Supervisor, who was responsible for making the decision to authorize the development and issued the January 3, 2012 ROD. Defendant Bob Bayer is based in the Manchester Ranger District, and was the Deerfield Wind Project Coordinator and in that role was responsible for conducting the NEPA process and issuing the FEIS. Defendant Kathleen Atkinson is the successor to Charles L. Myers, the Eastern Regional Forester who was responsible for denying the administrative appeal from his office in Milwaukee, Wisconsin.

49. Defendant-Intervenor, Deerfield Wind, LLC, and its parent, Iberdrola Renewables, Inc., as well as Iberdrola Renewables' parent, Ibedrola, SA, would be the immediate primary beneficiaries of the project. Iberdrola, SA, which is based in Spain, is the fourth-largest utility company in the world by market capitalization. In 2012, Iberdrola, SA recorded a gross operating profit of more than 7.727 billion euros, the highest in its history.

VII. Jurisdiction:

50. The jurisdiction of this Court is based on 28 U.S.C. § 1331, conferring on U.S. District Courts original jurisdiction of all civil actions arising under the laws of the United States; 28 U.S.C. § 1361, which confers jurisdiction to compel an officer or employee of the United States or any agency thereof to perform a legal duty owed to plaintiffs; 28 U.S.C. §§ 2201(a) and 2202, the statutes that empower this Court to issue a declaratory judgment and appropriate relief; the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*., which provides for judicial review of agency actions and for the setting aside of all such actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; the National Environmental Policy Act, 42 U.S.C. §§ 4231 *et seq*.; and the Wilderness Act, 16 U.S.C. §§ 1131 *et seq*.

VIII. Plaintiffs' Claims:

51. The plaintiffs make the following claims, all of which are based in part on Forest Service violations of the APA, which prohibits agency decision-making that is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

Count One: Violation of the Wilderness Act (George D. Aiken Wilderness)

52. Paragraphs 1-51 are re-alleged.

53. The Wilderness Act, including 16 U.S.C. § 1133(b), imposes on the Forest Service a substantive legal duty to be "responsible for preserving the wilderness character" of each wilderness area. The Forest Service regulations on wilderness, at 36 C.F.R. § 293.2, similarly require that "National Forest Wilderness shall be so administered . . . in such a manner as to preserve and protect its wilderness character. *** In resolving conflicts in resource use, wilderness values will be dominant. . . ."

54. These provisions require the Forest Service to refrain from actions, either in or adjacent to wilderness areas, that would degrade the wilderness character of a Congressionally-designated Wilderness Area, including the George D. Aiken Wilderness.

55. The siting of an industrial facility so close to the Aiken Wilderness would destroy or significantly degrade its wilderness characteristics, particularly during times when there are no leaves on the trees, and have the effect of turning the Aiken into a part-time wilderness area, an oxymoron and a result unknown to and unauthorized by Congress or by American law.

56. Issuance of the special use permit to the developer and construction of the Deerfield Wind Project would violate the Wilderness Act, and would be arbitrary, capricious, and not in accordance with law.

Count Two: Violation of NEPA (Bias and Conflict of Interest)

57. Paragraphs 1-56 are re-alleged.

58. The Forest Service selected one John Hecklau, of a company known as EDR, to draft the Agency's Deerfield Wind Project environmental documents, including the FEIS. Hecklau and EDR were employed and paid by the developer to do this work for the Agency. During the EIS process, Mr. Hecklau and his firm also did work on a New Hampshire wind project for the developer of the Deerfield project.

59. Prior to undertaking the work, Hecklau signed on behalf of himself and his company, EDR, a misleading conflict of interest statement on a Forest Service form. (A.R. 03C.00333.) The form claimed that neither he nor EDR had a financial or other interest in the project. But his firm's employer, Deerfield Wind, LLC, and its parent companies, Iberdrola Renewables, Inc. and Iberdrola, SA, directly benefited from the project. Moreover, it is reasonable to conclude that Hecklau and/or his company would benefit from the project, either directly or indirectly.

60. Mr. Hecklau signed a similarly misleading conflict of interest statement on January 4, 2013, relating to work he performed for the Forest Service in connection with the FSIR. (A.R. 18A.00031.) Mr. Hecklau again certified that EDR did not have any financial or other interest in the outcome of the project. (*Id.*)

61. A reasonable person would at the very least perceive an appearance of a conflict of interest. Hecklau and EDR, through their work on the Deerfield environmental documents, could grease the skids so as to ensure that the project ultimately would be built, and he and/or his company might gain further work with the developer, or with other wind developers, as a result.

62. The FEIS and its conclusions on environmental impacts, particularly respecting the impacts on the Aiken Wilderness, relied heavily on the opinions given by consultants who had testified before the PSB as paid advocates for the developer. The Forest Service FEIS plagiarizes verbatim sections of those advocacy documents, and misleadingly presents them as if they were neutral, unbiased and authoritative scientific work.

63. The Forest Service's selection and use of Hecklau and EDR violated 40 C.F.R. § 1506.5(c), which requires that NEPA agency contractors "be chosen . . . to avoid any conflict of interest."

64. The Forest Service's selection and use of Hecklau and EDR, and its use of work done by contractors on behalf of the developer before the Vermont PSB, wrongfully and unlawfully compromised the objectivity and integrity of the NEPA process, and its actions in that regard were arbitrary and capricious and contrary to law.

Count Three: Violation of NEPA (Impacts on the Aiken Wilderness)

65. Paragraphs 1-64 are re-alleged.

66. The noise study of the Deerfield Project relied on by the Forest Service FEIS failed to include sound receivers placed within the Aiken Wilderness. This omission resulted in a lack of data on which a reasonable or scientifically valid noise impact study could be predicated, and hence the Forest Service assertion in the FEIS that the noise of the turbines within the Aiken Wilderness would be at worst a 7 dba increase is entirely speculative. Many factors, including temperature, elevation, changes in topography, and wind currents, affect how sound travels and is heard, and further hard data were needed before such a conclusion reasonably could be drawn.

67. The noise study also asserted, without any rational basis, that the sound of wind turbines is very similar to that of natural wind, when the truth is that such turbines sound much like jet engines. The noise study in part based its claim that persons inside the Aiken Wilderness wouldn't notice the sound of the turbines on this patently incorrect and grossly misleading assertion.

68. The noise study attempted to justify its conclusions on environmental impacts by asserting that the Aiken Wilderness is an "isolated forest" with no residences nearby. But the facts that the Aiken Wilderness is isolated, and that it is a Wilderness Area, effectively increase the environmental impact of noise, not the opposite.

69. The visual impact study in the FEIS was incomplete. The consultant responsible for the study admitted that her conclusion that the visual impacts would be minor was based on trips to only "about seven of the many hills" within the Aiken. The FEIS intentionally deleted the phrase "of the many," thereby making it appear that the study was even less superficial than it actually was.

70. The visual impact study in the FEIS claimed, without any factual or scientific basis, that people inside the Aiken Wilderness would not look at ridgelines, where the wind turbines would be, but instead focus on features of the landscape that are closer to the viewer. But it is common knowledge that Vermonters, including people who frequent Wilderness Areas, do look at ridgelines. Moreover, the mammoth scale of the wind turbines, as well as the motion associated with their enormous blades, would be such that it would be impossible not to notice them, including at night, when they would be artificially illuminated with blinking lights.

71. The visual impact study in the FEIS stressed that the turbines would be seen only during the months of the year when the leaves are off the trees (about half the year

in Vermont), and claimed that this lessens the overall impact. But the FEIS also states that those seasons are the very ones when most people visit the Aiken, and if huge machines can be seen within a Wilderness Area for any significant periods, it is no longer a wilderness.

72. The visual impact study in the FEIS includes a section of many color photographic simulations of how the turbines will look from many vantage points, but omits, without explanation, any photographs of expected views of the turbines from within the Aiken Wilderness.

73. The FEIS treatment of noise and visual impacts of the wind turbines from within the Aiken Wilderness is incomplete, superficial, and based on speculation and untruths, and hence it violates NEPA and is arbitrary, capricious, and contrary to law.

Count Four: Violation of NEPA (Purpose and Need and Range of Alternatives)

74. Paragraphs 1-73 are re-alleged.

75. NEPA requires federal agencies to "study, develop and describe appropriate alternatives" to their proposed actions, and the statute's governing CEQ Regulations, at 40 C.F.R. § 1500.2(e), command such agencies "to the fullest extent possible . . . to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse affects of these actions on the quality of the human environment." The Second Circuit Court of Appeals has characterized the alternatives requirement as the "linchpin" of the NEPA process.

76. The Forest Service wrongfully and unlawfully failed to comply with NEPA by examining a "Range" of Alternatives located in the same land area only, and by selecting two Alternatives for the FEIS that were practical impossibilities—one already rejected by

the Vermont Public Service Board and one that the developer had determined earlier to be economically unfeasible.

77. The Forest Service wrongfully and unlawfully failed to comply with NEPA by refusing to consider an alternative site, Site #35, that the Agency characterized in the FEIS as similar to the one ultimately selected. But Site #35 is considerably farther away from the Aiken Wilderness and hence if the project were placed there it would result in fewer adverse visual and noise impacts on the Aiken. The Forest Service gave no reason why Site #35 is less desirable or appropriate for the proposed project than the site ultimately selected.

78. The Forest Service also failed to give an adequate or proper legal justification for its rejection of Alternative Three, a seven-turbine development on the eastern side of Route 8 only, which it deemed in the ROD to be the environmentally preferable Alternative.

79. In addition, the Agency failed to evaluate any sites that were not located in the National Forest, even though there are many potential wind power sites in Vermont that are located on private land.

80. Similarly, the Forest Service in the FEIS wrongfully and unlawfully put forth its NEPA-required examination of the Purpose and Need for the project in unreasonably narrow terms. By simply accepting the need to evaluate the project proposed by the developer, it blindly accepted the developer's goals, which is a NEPA violation.

81. The Forest Service's treatment in the FEIS of the Range of Alternatives and Purpose and Need was arbitrary and capricious and contrary to the requirements of NEPA.

Count Five: Violation of NEPA (Blasting)

82. Paragraphs 1-81 are re-alleged.

83. The Forest Service FEIS failed to make any study of the extent of adverse impacts from the blasting that will be necessary to erect the wind turbines, and failed even to study the locations where blasting would probably occur.

84. The FEIS gives a laundry-list of possible adverse impacts from blasting (including impacts to groundwater and groundwater flows, soils, drinking water supplies, alteration of wetlands, mud and rock slides, and the introduction into surface and groundwater of chemical pollutants), and further asserts that such impacts are by nature site-specific.

85. Rather than doing a site-specific analysis, as required by NEPA, the Forest Service elected to leave that analysis to the project blasting contractors, who presumably will be hired only after the special use permit for the project is issued. The FEIS offers no explanation for this serious omission.

86. The Forest Service's lack of proper analysis of the impacts on the human environment of blasting violates NEPA, and is arbitrary and capricious and contrary to law.

Count Six: NEPA Violation (Bats)

87. Paragraphs 1-86 are re-alleged.

88. The FEIS treatment of bat mortality caused by the wind turbines was based in significant part on the belief of the U.S. Fish and Wildlife Service that approximately one million bats have died from a fatal condition known as white-nose syndrome.

89. On or about January 17, 2012, two weeks after the Forest Service published the Deerfield environmental documents, the USFWS issued a new and substantially increased estimate of bat deaths from white-nose syndrome of 5.7 to 6.7 million.

90. Four bat species found in Vermont are listed by the State as either threatened or endangered. The USFWS may soon list the little brown bat, which the FEIS admits is present at the project area, as threatened or endangered.

91. The FEIS is superficial and fatally-flawed in that the studies on which it is based failed to identify the species of more than half of the bats that were recorded as present in the project area. Without knowing which bat species may be affected by the wind turbines, the defendants cannot reasonably claim to have fully disclosed the impacts of the project on bats, in violation of NEPA. The Forest Service simply does not know whether these "unknown" bats include the little brown bat. Likewise, the Forest Service does not know whether the "unknown" bats include eastern small-footed bats and/or northern long-eared bats, two other species currently being considered for endangered or threatened status by the USFWS, and which are indigenous to Vermont.

92. Given that the mortality from white-nose syndrome is far greater than what government scientists believed to be the case when the FEIS was drafted and issued, the overall impact of bat deaths from any source, including the Deerfield Wind turbines, should be of much greater concern. The new estimate reasonably could potentially lead the Forest Service to determine that the perceived advantages of the wind turbines on the mountain ridges in question are no longer worth the environmental cost.

93. Where, as here, there is a significant change in scientific opinion regarding environmental impacts of a federal project, the agency in charge is required under

NEPA to conduct a supplemental EIS to study and disclose to the public such impacts before proceeding further.

94. Plaintiff VCE in its administrative appeal to the Forest Service specifically requested that the Agency decline to issue a special use permit for the Deerfield Wind Project until further, more accurate bat studies, and a determination of the project's environmental costs, are conducted based on the new information. The Forest Service has refused to do so, and such refusal violates NEPA and is arbitrary and capricious.

WHEREFORE, the plaintiffs pray this Court:

1. (a) To issue a judgment declaring that construction of the Deerfield Wind Project in the area now proposed for the turbines would violate the Wilderness Act and the APA; and (b) to issue a preliminary and permanent injunction barring the Forest Service from taking any steps to implement the project (including, without limitation, road-building, clearing of land, cutting of trees, blasting, excavation, or other such construction activities, or allowing or authorizing any third-parties to engage in such activities), and prohibiting the Forest Service from issuing a special use permit for same;

2. In the alternative, (a) to issue a judgment declaring that the Forest Service FEIS violates NEPA and/or the Wilderness Act; and (b) to issue a preliminary and permanent injunction barring the Forest Service from taking any steps to implement the project (including, without limitation, building of roads or trails, clearing of land, cutting of trees, blasting, excavation, or other such construction activities, or allowing or authorizing any third-parties to engage in such activities) and prohibiting the Forest Service from issuing a special use permit for same; and (c) remanding the matter to the Forest Service for further environmental study should the Agency elect to proceed further;

3. To grant the plaintiffs their costs, attorney's fees, and other expenses, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(a); and

4. To grant the plaintiffs such further relief as this Court may deem just and equitable.

Dated at Manchester Center, Vermont this 27th day of September 2013.

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